87-304

Supreme Court, U.S.
FILED
JUL 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WILLIAM LEIGHTON,

Petitioner, Objector-Appellant below,

v.

(1) BEATRICE COMPANIES, INC. et al.

(2) Kohlberg, Kravis, Roberts & Co.

and Joel B. Smilow,

(3) James L.Dutt,

Respondents, Defendants-Appellees

below.

PETITION FOR CERTIORARI TO THE SUPREME COURT OF DELAWARE

William Leighton

Petitioner

249 West 11th Street

New York, N.Y.,10014

(212)255-0001

August, 1987

Question Presented

Whether Article VI, Second Clause, of the Constitution of the United States requires the Delaware courts to apply the provisions of the Investment Company Act of 1940, the Securities Exchange Act of 1934 and the Securities Act of 1933 to the Beatrice-BCI merger, upon the objection of petitioner, a beneficial shareholder of Beatrice before the effective time of the merger, regardless of whether petitioner would have had standing, under Delaware law, to sue as a plaintiff in order to enjoin the consummation of the merger.

List of Parties

Petitioner William Leighton, objector and appellant below, became a beneficial shareholder of Beatrice before the Effective Time of the Beatrice-BCI merger by purchase of shares on the New York Stock Exchange and has since been continuously a preferred shareholder of BCI Holdings Corporation, Beatrice's successor in interest by virtue of Delaware law.

Respondent, defendant and appellee below, Beatrice Companies, Inc., is a Delaware corporation which, until April 18, 1986, was listed on the New York Stock Exchange. Beatrice had assets of about $6,200,000,000, 50,000 shareholders and was then engaged in interstate commerce as is BCI, its successor in interest under Delaware law. Over petitioner's objection, BCI has not been

made a party to this proceeding.

Respondent, defendant and appellee below, Kohlberg, Kravis, Roberts & Co., ("KKR") is a New York partnership which has created BCI for the ostensible purpose of taking over Beatrice. The real purpose was to bring about the liquidation and dissolution of Beatrice without the prior knowledge or consent of Beatrice shareholders of record and beneficial as of April 17, 1986.

The individual respondents, defendants-appellees below represented by counsel for Beatrice are : Angelo R. Arena, Bernard A. Monaghan, Omer G. Voss, Murray L. Weidenbaum, Alexander Brody, G.A. Constanzo, Walter J. Leonard, Goff Smith, James W. Cozad, Cedric E. Ritchie, William G. Karnes, Jayne B. Spain, Russell Wagner, William W. Granger, Jr., David E. Lipson, Frank E. Grzelecki,

Anthony Luiso, William S. Mowry
and Richard J. Pigott.

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465 U.S. 1001 (1984).

Official and Unofficial Reports

To date, the Chancery Court's ("Ch.") opinion of April 16, 1986, R.1a - 34a. has not been published. A final order and judgment, R. 35a - 40a, was entered on the same day.

The Delaware Supreme Court's ("DSC") order dismissing petitioner's appeal (but affirming the judgment on the appeal of another objector), R. 50a - 66a, has not been published. It is mentioned, however at 522 A.2d 865 (1987).

A petition for rehearing (which, under DSC Rule 18 is known as "motion for reargument") was denied on March 24, 1987.

Jurisdiction

The date of DSC's judgment sought to be reviewed is February 20, 1987. The

date of the order denying a motion for reargument (petition for rehearing) is March 24, 1987.

By Order of MR. JUSTICE BRENNAN dated June 19, 1987, petitioner's time to petition for certiorari was extended to and including July 22, 1987. By Order of MR. JUSTICE WHITE, petitioner's time was further extended to and includidng August 21, 1987.

Jurisdiction to review this case by writ of certiorari is conferred upon this Court by 28 U.S.C. Sec. 1257(3). As this case involves the constitutionality of Delaware statutes and rules, copies of this petition have been served upon the Attorney General of the State of Delaware, Rule 28(c).

Constitutional Provisions, Statutes, Rules and Regulations

Constitution of the United States, Article VI, Section 2 :

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Investment Company Act of 1940, 15 U.S.C. Sec. 80a:

Sec. 3(a). When used in this title, "investment company" means any issuer which --- (3) is engaged or proposes to engage in the business of

investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 percentum of the value of such issuer's total assets * * *

(b)Notwithstanding paragaraph (3) of subsection (a), none of the following persons is an investment company within the meaning of this title: * * * (2) any issuer which the Commission, upon application by such issuer, finds and by order declares to be primarily engaged in a business or businesses other than that of investing, reinvesting, owning, holding, or trading in securities * * *.

The filing of an application under this paragraph in good faith by an issuer other than a registered investment comapny shall exempt the applicant for a period of sixty days from all provisions of this title applicable to investment companies as such. * * *

Transactions by Unregistered Investment Companies

Sec. 7(a). No investment company organized or otherwise created under the laws of the United States or of a State and having a board of directors, unless registered under section 8, shall directly or indirectly--

(1) offer for sale, sell, or deliver after sale, by the use of the mails or any means or instrumentality of interstate commerce, any security or any interest in a security whether the issuer of such security is such investment company or another person; or offer for sale, sell or deliver after sale any such security or interest, having reason to believe that such security or interest will be made the subject of a public offering by use of the mails or any means or instrumentality of interstate commerce;

(2) purchase, redeem, retire, or otherwise acquire or attempt to acquire, by use of the mails or any means or instrumentality of interstsate commerce, any security or any interest in a security, whethere the issuer of such security is such investment company or another person;

(3) control any investment company which does any of the acts enumerated in paragraphs (1 and (2);

(4) engage in any business in interstsate commerce; or

(5) control any company which is engaged in any business in interstate commerce.

Validity of Contracts

Sec.47(b)(1) A contract that is made, or whose performance involves, a violation of this title, or of any rule, regulation, or order thereunder, is unenforceable by either party (or by a

nonparty to the contract who acquired a right under the contract with knowledge of the facts by reason of which the making or performance violated or would violate any provision of this title or of any rule, regulation, or order lthereunder) unless as court finds that under the circumstances enforcement would produce a more equitable result than nonenforcement and would not be inconsistent with the purposes of this title.

(3) This subsection shall not apply (A) to the lawful portion of a contract to the extent that it may be severed from the unlawlful portion of the contract, or (B) to preclude recovery against any person for unjust enrichment."

Securities Exchange Act of 1934, 15 U.S.C. Sec. 78g:

Margin Requirements

Sec. 7(a) For the purpose of preventing the excessive use of credit for the purchase or carrying of securities, the Board of Covernors of the Federal Reserve System shall, prior to the effective date of this section and from time to time thereafter, prescribe rules and regulations with respect to the amount of credit that may be initially extended and subsequently maintained on any security (other than an exempted security).

Federal Reserve Press Release

January 10, 1986

The Federal Reserve Board has adopted an interepretation applying maargin requirements to a narrow class of debt securities that are sometimes issued to obtain credit for the purchase of

margin stock in corporate takeovers.

The interpretation deals only with certain situations involving a shell corporation used to finance the acquisition of margin stock of a target company. Such a shell has : virtually no business operations; no significant business function other than to acquire and hold the shares of the target company; and, substsantially no assets or cash flow to support the credit other than the margin stock it has acquired or intends to acquire.

The interpretation clarifies that debt securities issued by such a shell are presumed to be indirectly secured by the stock to be acquired and are thus subject to provisions of Regulation G (Securities Credit by Persons Other than Banks, Brokers or Dealers).

The presumption in the interpretation that debt securities are indirectly secured by margin stock would

not apply if there is specific evidence that lenders could in good faith rely on assets other than the margin stock as collateral, such as a guaranty by the parent of the shell corporation.

The interpretation also would not apply to other general types of transactions involving operating companies with substantial assets or cash flow, or where there is an agreed-upon merger or statutory "short-form" merger.

The Board wrote clarifying language into the final version of the interpretation to narrow its scope further and to make clear that the term "indirectly secured" will continue to apply as it has in the past.

Presently, the Board has a 50 percent margin on margin stock and convertible bonds. This means that a lender may extend credit for half the value of the stock securing the credit.

The interpretation does not apply to written contracts to extend credit entered into prior to the effective date of the interpretation, January 10, 1986.*

* *

Validity of Contracts

Section 29(b) - please see footnote (3), page 85a of the Appendix to this petition.

Delaware Corporation Law

8 Del. C. Section 327

In any derivative suit by a stockholder of a corporation, it shall be averred in the complaint that the plaintiff was a stockholder of the corporation at the time of the transaction of which he complains or that his stock thereafter devolved upon him by operation of law.

Delaware Supreme Court

Rule 8.

Only questions fairly presented to the

trial court may be presented for review; provided,however, that when the interests of justice so require, the Court may consider and determine any question not so presented.

Rule 18. Reargument.

A motion for reargument may be filed with the Clerk within 15 days after filing of the Court's opinion or order unless the time is enlarged by the Court. * * *

Statement of the Case

This is a petition for certiorari by an objector to the settlement of several stockholder class actions and derivative suits which essentially sought to prevent the Beatrice-BCI merger of April, 1986. BCI is a newly formed Delaware corporation with a capitalization of $15,000 in February, 1986. Petitioner objected below on the grounds that the merger violated several provisions of the Investment Company Act of 1940, e.g. Section 7(a) thereof, and of the Securities Exchange Act of 1934, 15 U.S.C. Sec. 78g and F.R.B. Regulations U and G thereunder, see e.g. Alaska Interstate Co. v. McMillan, 402 F.Supp. 532 (D.Del., 1975). No question of petitioner's standing to object was considered by the Chancellor at the time of the "fairness" hearing on April 14,

1987. Therefore, under the strict construction of DSC Rule 8, no such question could be decided by the DSC as a matter of first impression.

On appeal to the DSC, that court refused petitioner's request, made over a year ago, to remand for the purpose of reopening the record and receiving additional evidence, R.42a - 45a, which was accumulating in the wake of the merger.

Late in August, 1986, DSC denied respondents' motion to affirm the judgment, R.46a-47a, requesting that particular attention be given to these points in petitioner's opening brief:

Point IV, KKR's tender offer for Beatrice,

Point VI, whether BCI was an indispensable party to the suits,

Point VII Applicability of the business judgment rule and

Point VIII, concealment from the

Chancellor of KKR's request for a "no-action" letter from the S.E.C. None of these points were dealt with in DSC's order of February 20, 1987 dismissing petitioner's appeal, R. 58a - 61a, and affirming the judgment on the appeal of another objector.(The two appeals had been consolidated).

Instead, DSC concentrated its fire on petitioner's standing to object, which, as aforesaid, had not been ruled upon by the Chancellor for the reason that the respondents had not raised the point at the hearing. Again, the federal questions that had been raised by petitioner in his submissions to the Chancellor were not passed upon despite extensive briefing. No oral argument was heard. R.59a.

Meanwhile, evidence became available in the wake of the mushrooming insider trading scandal that insider trading may have occurred in the stock of

Beatrice. As the drama unfolded in New York, petitioner moved to supplement the record before a decision was handed down. This request, too, was denied, R. 48a-49a. Thus, the DSC's final decision which is before this Court for review, has ignored petitioner's pleas that reality should prevail over fiction.

In October, 1986, Ilan K. Reich who had been a partner in the New York law firm of Wachtell Lipton Rosen and Katz until July, 1986 was convicted, upon his plea of guilty, of peddling inside information for profit to others and sentenced to prison. Reich is now serving his sentence. No one has asked Reich whether he had also peddled inside information about KKR's targetting of Beatrice as a takeover candidate in the summer of 1985. In May, 1987, Reich was disbarred by order of the Appellate Division, First Department of the New

York State Supreme Court and enjoined from practicing law in any form. On Wachtell Lipton's letterhead, Reich was two steps junior to Warren K. Stern, Esq., another partner of Wachtell Lipton who had appeared before the Chancellor at the "fairness" hearing. Under New York partnership law, Wachtell Lipton are charged with knowledge of, and are liable for, Reich's acts.

Then, in February, 1987, Martin A. Siegel, KKR's agent in the scheme to accumulate Beatrice stock prior to the merger, also pleaded guilty to an information charging him with conspiracy to peddle inside information and profit therefrom. No one has asked Siegel what he had done with respect to Beatrice stock while working at Kidder Peabody, a brokerage firm. Siegel has not yet been sentenced and is believed to be "singing" before a Federal grand jury in New York.

In effect, Siegel was masterminding a conspiracy to violate S.E.C. Rule 10b-13, among others. For the S.E.C.'s current views on this rule, please see its brief in Texaco, inc. v. Pennzoil Co., excerpts from which are included in the appendix, 80a-87a. In an advertisement published in the Wall Street Journal in April, 1986, Kidder Peabody gave notice that it had "assisted in the negotiations and acted as financial advisor to KKR" in the transaction.

The pending appeal before the DSC

On March 30, 1987, petitioner notified the respondents that a petition for certiorari could be filed to seek review of the DSC's final decision in No. 156, 1986 therein. As a result, the Chancellor refused to order Beatrice to pay $3,200,000 as plaintiffs' attorneys

fees and $5,000,000 to the class.

Mindful of the requirements of this Court's Rule 21.1.(h), petitioner undertook a second round of efforts in order to persuade the Chancellor to vacate the judgment of April 16, 1986. Obviously, if that judgment had been vacated, there would have been no need to apply for certiorari.

The second round has resulted in the Chancellor's decision of June 23, 1987, R.68a - 70a. A motion for reargument was denied on July 6, R. 71a. Notice of appeal to DSC was filed on July 22, 1987, R. 73a.

Meanwhile, the time to petition for certiorari was running and this petition had to be filed.

The pending appeal in DSC will consist of a final effort in the Delaware courts to have DSC decide federal questions consistent with this Court's

decisions in such cases as Herman & MacLean v. Huddleston, 459 U.S. 375 (1983) and Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11, regardless of 8 Del. C. 327.

Petitioner is aware of the basic principle that two courts cannot have jurisdiction of the same cause at the same time. In light of the Delaware courts' consistent refusal to decide federal questions and the Chancellor's holding that this petitioner has "no standing to litigate any aspect of this matter", R.70a, (a holding which the defendants could argue, in other forums, that it is res judicata), it is time that the matter should be brought to this Court's attention after a sixteen months' journey through the Delaware courts.

Petitioner's claim is based on the

Beatrice-BCI prospectus of March 11, 1986, R.74a - 79a, which governed all sales of Beatrice common stock during the period of its validity, March 11 - June 9, 1986. The prospectus has not been considered by the Chancellor despite petitioner's repeated efforts to have him look at it. The respondents have seen to it, in April, 1986, that the Chancellor should be spared the surprises that it contains.

In so doing, the respondents have acted out of their self-interest and greed. The prospectus falsely stated that Donald P. Kelly, who was therein described as a partner in Kelly, Briggs & Associates, would become a director of BCI. In effect, Mr. Kelly was to become and did become BCI's Chief Executive Officer and had a Plan for the Liquidation and Dissolution of Beatrice. Nothing in the prospectus even remotely

hinted at the existence of such a Plan, which became effective on May 29, 1986, six weeks after the "fairness" hearing before the Chancellor.

The prospectus also described the terms of the preferred stock which the Chancellor had praised as a major achievement of the settlement worth at least $130,000,000 to the class, R.19a.

Turning a closed eye to the requirements of Section 7(a) of the 1940 Act, the Chancellor did not go to the trouble of examining the legal basis for the issuance of such stock without an exemption from that provision of the Act, see Sec. 3(b)(2) thereof. The preferred no longer exists because KKR has called it in July, 1986 for exchange into debentures. In turn, $800,000,000 of the debentures were called in November, 1986 resulting in a yearly profit to KKR's partnerships of $122,000,000 for the

16-year assumed life of the debentures, or $1,952,000,000. ($800,000,000 x 15.25%=$122,000,000 x 16=$1,952,000,000). The $800,000,000 came out of the liquidation of Beatrice's assets.

On the pending appeal, the DSC may or may not reverse the Chancellor and direct him to see that federal laws are being observed by KKR. Judging by its previous decision, it is likely, however, that DSC will again take refuge behind 8 Del. C. Sec. 327. This is a situation that should be resolved by this Court.

The upshot of this lawlessness is that KKR has been able to realize hundreds of millions of dollars from its misdeeds which the Chancellor refuses to order to have audited per this petitioner's request, R.68a - 69a. As a result result KKR has hundreds of millions of dollars at its disposal whereas this petitioner and other Beatrice shareholders have nothing. This

is hardly consistent with the principle of Equal Justice under the Law.

With nothing in their hands except their stock, the shareholders are supposed to match respondents' legal resources in the defense of their federal rights.

When and How the Federal Questions Were Raised Below

Initially, the federal questions were raised by written submissions to the Chancellor dated April 4 and 14, 1986. The Chancellor passed on these in terse terms, R.25a. Federal questions were again raised by motion for reargument. This was denied on April 25, 1986, R.41a.

At the appellate level, federal questions were set forth at length in petitioner's opening and reply briefs. Once more, they were disregarded as unimportant, R.57a, 59a.

On the second round, federal

questions were raised and the opening pages of the March 11, 1986 prospectus were again submitted to the Chancellor. Nothing came of this effort, R.68a - 70a. On July 31, 1987, the respondents moved to dismiss the second appeal (No. 231, 1987) without briefing or argument. In opposition, petitioner again raised federal questions. That motion is still pending.

Reasons for the Allowance of the Writ

1. The power to enforce Article VI, Section 2 of the Constitution rests solely and exclusively in this Court. The Delaware judges' manifest disregard for their duties under Article VI requires the intervention of this Court.

It is not the purpose of this petition to urge this Court to decide, in the first instance, the federal questions raised below.

2. In the Texaco Inc., v. Pennzoil Co. case, the Texas Court of Appeals has decided a dispositive issue under SEC rule 10b-13. While the SEC has now urged the Texas Supreme Court to reverse that ruling, R.80a - 87a, the point is that there is no jurisdictional bar to a State court's consideration of the mandates of federal law. The Delaware courts should not be permitted to create such a bar where none exists. There should be a uniform rule for State court observance of federal securities law.

3. The federal questions presented below are of great importance in the current wave of mergers and acquisitions and should be resolved first.

Forty percent of the companies listed on the New York Stock Exchange are incorporated in Delaware. This gives the

great power over interstate commerce. The Delaware courts should be specifically required to comply with the mandates of federal securities law.

4. In the recent past, this Court has twice granted certiorari to resolve questions arising under the Investment Company Act of 1940. Daily Income Fund v. Fox, 464 U.S. 523, (1984) and Weiss v. Temporsary Investment Fund, 465 U.S. 1001 (1984). The issues presented by the case at bar exceed in importance the issues decided in Daily Income Fund and Weiss.

5. At this Term, this Court will hear oral argument in U.S.A. v. Carpenter et al.No. 86-422, a relatively minor insider trading case involving a small jurisdictional amouont. The time spent by the Government on that case is wholly out of proportion to its significance.

The case at bar presents a major insider trading issue affecting 50,000

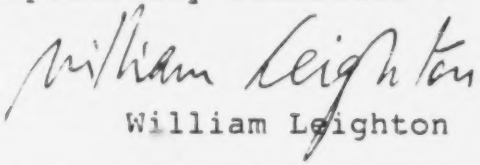
shareholders and a major corporation with $6,200,000,000 in assets. The Delaware courts have suppressed the facts with respect to insider trading on the theory that any wrongdoing, no matter how serious, is sanctioned by recourse to 8 Del. C. Sec. 327. This creates a haven for wrongdoers in Delaware and has a substantial effect on interstate commerce. The Siegel episode is illustrative of the method being used by wrongdoers. Whereas Siegel has been convicted in February, 1987 in the S.D.N.Y. for conspiracy to engage in insider trading, he has not even been summoned to appear and testify before the Chancellor concerning his relations with KKR and his trading of Beatrice stock in anticipation of KKR's tender offer.

Conclusion

The February 20, 1987 judgment of

the Delaware Supreme Court should be summarily reversed and the case remanded with directions that the Delaware courts should consider and rule on the federal questions raised by petitioner.

Respectfully submitted :



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APPENDIX

On Petition for Certiorari to

the Supreme Court of Delaware

William Leighton

Petitioner

249 West 11th Street

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(212)255-0001

August, 1987

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DSC = Delaware Supreme Court

Ch. = Chancellor

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

In re Beatrice Companies, Inc. Litigation

Consolidated Civil Action No. 8248

MEMORANDUM OPINION

Submitted: April 14, 1986

Decided : April 16, 1986

* * * * * * * * * * * * * *

ALLEN, Chancellor

The captioned consolidated action is brought both as a class action on behalf of stockholders of Beatrice Companies, Inc. (including those owning securities convertible into stock, but excluding defendants) and as a

derivative action on behalf of Beatrice itself (sometimes herein referred to as the "Company").

It constitutes a broadly-based challenge to the validity of key features of an agreements contemplating a leveraged buy-out of the Company by defendant Kohlberg, Kravis, Roberts & Co. ("KKR"). The relief sought by the amended complaint includes an order enjoining consummation of the merger that would effectuate KKR's purchase of all the Company's stock.

Pending is an application pursuant to Chancery Rules 23(e) and 23.1 for the approval as fair to Beatrice and members of the class, of a settlement of the claims alleged in the amended complaint. Notice of the proposed settlement and of the April 14,1986 hearing on the fairness of its terms, was mailed to

class members. This is this Court's opinion on the pending application and on the related request of twenty-one law firms representing various plaintiffs in these and related actions for an award of attorneys' fees for services provided in the lawsuits.

I.

An assessment of the fairness and adequacy of the proposed settlement to the Company and its present stockholders must start with a sketch of the facts out of which the dispute arises. Those facts, at this stage, appear largely agreed upon even if the motivating forces behind them and their legal consequences remain contested. It is elementary that on a motion of this kind it is not required (indeed not impossible) for the Court to determine

if the claims proposed to be settled would ultimately be found to be valid if put to the test of trial.

In the late summer of 1985 rumors apparently began to circulate in the financial community that Beatrice was or was likely to become the object of a takeover attempt. Such rumors allegedly caused concern among Beatrice's management and in response it is contended that the Compensation Committee of the Company's board of directors (which committee was comprised entirely of independent directors) modified the employment agreements of both select senior officers and a larger group -- approximately fifty in number -- of managers. These modifications allegedly provided wastefully extravagant protection to such officers

and managers in the event of a change in the control of Beatrice.

On October 16, 1985, KKR submitted to the board of Beatrice an offer to acquire the Company in a transaction in which Beatrice's stockholders would receive $40 in cash and $5 in market value of preferred stock for each share of Beatrice common stock. On October 20, 1985, after a report from its investment bankers, the Beatrice board rejected that offer as inadequate.

On October 29, 1985 KKR increased its offer to $40 in cash and $7 in market value of preferred stock. On October 31, 1985the Beatrice board authorized management to commence discussions with KKR with respect to its revised offer and to explore alternatives that would maximize the value of Beatrice to its

stockholders. Thereafter, the Company's investment bankers sought to determine whether there were other potential acquirors for the Company and, by November 10, 1985, it sent certain information designed to explore any such interest to approximately 75 potential buyers.

At about that time, the Dart Group Corporation, in connection with E.F. Hutton & Co., Inc., expressed an interest in acquiring Beatrice for $48 per share in cash. On November 12, 1985, KKR offered to acquire Beatrice in a transaction consisting of $43 in cash and preferred stock of the Company to be formed to acquire Beatrice; the preferred stock was to have a market value of $7. This offer was conditioned, among other things, on

Beatrice's agreement to (1) a provision (the "Termination Payment Provision") that, if the acquisition were not completed but other conditions were met, including the acquisition by another party of 30% of Beatrice's outstanding common stock or a firm proposal to acquire Beatrice at a consideration equivalent to more than $50 per share, KKR would be entitled tc a cancellation fee of $123 million, and (2) a provision (the "Asset Option Agreement" granting to KKR an option to purchase either Beatrice's grocery food and Tropicana subsidiaries for $2.391 billion or certain alternative assets, also including the Tropicana subsidiary, for a price of $2.412 billion. KKR's November 12 offer was conditioned upon acceptancence by Beatrice no later than November 13, 1985.

The Beatrice board met on November 13 and 14, 1985 and heard the opinions of its investment banking firms - Salomon Brothers and Lazard Freres - that the consideration offered by KKR was fair to the holders of Beatrice's common stock from a financial point of view. Also, the board learned at that time that the Dart-Hutton offer had been withdrawn. The complaint alleges that at about that time the board conferred upon senior management additional rights triggered by a change in control and was advised that KKR had agreed to honor these modifications of the Company's employment compensation agreements.

The Beatrice board accepted KKR's terms and agreed to a merger agreement which, among other things, prohibited the solicitation of alternative proposals or offers for Beatrice or any

of its subsidiaries. The board also agreed to the lock-up options and the cancellation fee provisions. The first of these suits was filed on November 15, 1986, although an earlier related case challenging the August compensation agreements had been filed in Illinois state courts.

In December, 1985, KKR was provided access to Beatrice's books and records. It determined, at that point, that the available cash flow from the Beatrice businesses was insufficient to support its November 12 merger proposal. Accordingly, on January 8, 1986, KKR sought to modify the terms of its November 12 offer by changing the consideration payable for each share of Beatrice common stock to $40 in cash and 10/25th of a share of preferred stock of the acquiring company, which would have

a liquidation preference of $25 per share and would pay a semi-annual dividend at the rate of 14% per annum, with KKR having the right to pay dividends for 6 years in additional shares of such preferred stock instead of cash.

At a January 15, 1986 meeting, the Beatrice board authorized its financial and legal advisors to develop and explore other possible options open to Beatrice. Thereafter, representatives of Beatrice had extensive discussions with representatives of KKR and with the representatives of the plaintiffs in these consolidated actions. As a result of these negotiations, modifications were made to the agreement of merger (e.g. eliminating the lock-up and the no-shop provisions and modifying the consideration to be paid in the merger), and to the employment and consulting

agreements of Beatrice's executives. These changes, which are spelled out in slightly more detail below, provide the basis for the stipulation of settlement presently before the Court.

II.

Consolidated in this court are nine actions arising out of the foregoing facts; seven related actions filed in Illinois courts, also challenging those actions have recently been dismissed without prejudice in connection with the stipulation of settlement. A "Unified Consolidated and Amended Complaint" has now been filed. It names as defendants the Company, KKR and all of the directors of the Company. The claims proposed to be settled by the Stipulation of Settlement are set forth in the amended complaint in three counts.

Count I of the amended complaint purports to allege at least 8 separate grounds for relief.

(1) It challenges the August, 1985 amendments to the employment agreements of Beatrice's officers and senior management as constituting a waste of corporate assets and a breach of fiduciary duty.

(2) It challenges the granting of certain termination rights to certain officers and key empoyees (in the jargon "golden parachutes") which the complaint alleges obligates the Company to pay up to $63.5 million. These rights are said to constitute a breach of fiduciary duty, a gift and waste of corporate assets.

(3) It asserts that the board breached its duty of care in that it failed to actively shop the Company

before accepting the November 12 offer of KKR.

(4) it challenges the Asset Option Agreement as serving no valid corporate purpose and as serving as a device wrongfully to inhibit bidding on the Company.

(5) It challenges the Termination Payment Provision as a waste of assets and as a device to inhibit competitive bidding.

(6) It challenges the consideration to be received pursuant to the November 12 KKR offer as inadequate ;

(7) It challenges the adequacy of the public disclosures made with respect to the proposed transaction; and

(8) It alleges that KKR knowingly participated in the foregoing alleged breaches of duty and thus is liable for damages arisinig from those acts.

Count II of the amended complaint

purports to assert derivatively claims of Beatrice. Count II challenges the obligation of the Company to make certain employment termination payments and the obligation of the Company to pay a termination fee to KKR as wrongs to the Company itself.

Count III is limited to claims of breach of duty including waste of the Company's assets, arising from payments that the Company obligated itself to make to its former chairman in connection with his resignation from office in August, 1985.

III.

Following the January, 1986, three-party negotiations referred to above, a memorandum of understandding was entered into that forms the basis for the settlement of the foregoing

claims. Pursuant to the terms of that memorandum (1) the Asset Option Agreement has been terminated and Beatrice obligated itself not to grant to KKR any further option with respect to its assets, (2) the $123 million cancellation fee was reduced to approximately $19 million, (3) the November, 1985 merger agreement has been revised to delete the no-shopping provision which has led to a thorough search by the Company's investment bankers for alternative offers for the Company; (4) the right of the Company to pay a cash dividend of up to $.45 per share of common stock and $.845 per share of preference stock was expressly confirmed and (5) consideration to be offered for each share of the Company's common stock was altered to consist of $40 in cash and 10/25th of a share of

preferred stock, which would have an annual dividend rate not of 14% as offered on January 8, but 15¼% payable quarterly.

In addition, the memorandum of understanding contemplated certain changes in executive compensation which would result in savings to Beatrice and which presumably contributed to KKR's ability to increase the interest rate that the preference stock to be issued in connection with the merger is to bear.

The modification of the employee bonus plans contemplated by the memorandum of understanding will reduce executive compensation triggered by a change in control by an amount estimated to be in excess of $23 million. In addition, certain non-qualified stock options having an approximate value of $1.8 million have been surrendered. The

memorandum of understanding further provides for additional reductions in executive compensation and for payment by Beatrice, in connection with the closing of the proposed merger, of $5 million to the holders of Beatrice common stock of record at the effective time. Finally, the memorandum of understanding provides that consummation of the settlement would be subject to, among other things, approval by the Beatrice board, consummation of the merger (or an alternative transaction arising as result of Beatrice's freedom to solicit alternatives), the completion by plaintiffs of further discovery and depositions in the consolidated litigation and Court approval of the settlement and the dismissal of the actions with prejudice.

IV.

In reviewing the terms of the

proposed settlement, I conclude that both Beatrice and the class on whose behalf these actions are prosecuted will receive real and substsantial benefits therefrom. Indeed, certain negotiated changes, such as the rescission of the no-shopping provision have already conferred important (if non-quantifiable) benefits on the Company's shareholders; even though it appears that the canvassing of alternatives has lead to no alternatives to the KKR offer, shareholders now have the comforting knowledge that no higher offer from a third-party has been overlooked. Other benefits --- such as the reduction of the termination payment to KKR --- will in all likelihood not result in the realization of financial gain to the Company or its stockholders, since the merger appears now very likely to be effectuated. Yet such benefit can be said therefore to be ephemeral only

in the sense that a life insurance policy can be said in retrospect to have been of no value to a still living man.

More important, however, are the financial improvements that the settlement contemplates. I will mention three. The increases from 14% to 15⅛% of the interest to be paid on the preferred stock has been valued by Salomon Brothers as worth at least $1.06 per share of Beatrice common (or more than $130,000,000 to the class). The payment of the March dividend contemplated by the memorandum of understanding --- which could resasonably have been resisted by KKR at least without an offsetting price adjustment --- has a value of some $55,000,000 to the class. In addition, the $5,000,000 additional payment to the Company's stockholders at closing is not a insignificant benefit. I need not now

further consider the reduction in executive compensation, that was negotiated since the benefits thereby conferred on the Company are probably implicitly reflected in the enhanced interest rate that KKR has agreed to pay with respect to the preferred.

In addition to finding these benefits substantial, I conclude that they constitute fair and reasonable compensation for the dismissal of the claims asserted in the amended complaint. While I need not finally evaluate those claims, two things may be said about them that relate to the current applications. First, without endorsing in any respect the theories that give rise to these suits, I note that the suspicion that generated them --- that is the worry that the Beatrice management was attempting too hurriedly to promote the sale of the Company

perhaps to an entity favored by it so as to protect management's position and benefits --- was understandable in the circumstances. Second, given the important fact that the board of Beatrice is comprised largely (more than 50%) of outside directors who had no financial interest in the various transactions alleged, the complaint's conclusory allegations attempting to make out a breach of duty of loyalty seem --- at first blush at least --- not to have much weight. And as to the claim of breach of duty of care, history has shown it to be a very rare case in which the judgment of disinterested directors who follow a deliberate process in reaching a business decision will be found to have breached that duty. Thus, I conclude that the burden assumed by plaintiffs in order to achieve a judgment in these cases was a very heavy one.

I therefore conclude that the substantial benefits contemplated by the stipulation of settlement are more than fair and reasonable compensation for the release of the claims asserted in the amended complaint

V.

In making the determination that the proposed settlement is fair, reasonable and adequate, I have considered the views of the three stockholders who have sent written statements to the Court objecting to the application. The complaint of Mr. and Mrs. Kent is that they ought not be forced to liquidate their position in Beatrice against their will. However, in matters of this kind, as in other important public matters, the law subjects the rights of the Kents to the will of an informed majority vote. Some 98% of the voting Beatrice shareholders

have approved the proposed KKR merger. If dissenting shareholders are dissatisfied with a merger, the law provides an appraisal remedy for them in appropriate circumstances.

Mr. Joseph Yablonski complains that the price KKR will pay is too low, that the attorneys for plaintiff have contributed nothing to the improved terms of the present KKR deal and that the defendants have agreed to the settlement simply in order to protect themselves from future claims of personal liability. As to the first poiint, Mr. Yablonski's opinion on value may be sound, but it is inconsistent with the opinion of Salomon Brothers, with the overwhelming approval of the deal by the votinig Beatrice stockholders, and more importantly, inconsistent with the fact that no alternative offer was forthcoming after

a thorough search (which was unimpeded by the lock-up agreement on the $123 million termination fee). In these circumstances, if it were part of my responsibility on this application to determine whether the terms of the proposed merger reflect a fair and adequate price (which it is not), I could point to nothing to support Mr. Yablonski's view that the price offered is "too low".

Mr. Yablonski's contention that this litigation contributed nothing to the improved terms of the present KKR deal is dealt with below. As there explained, I cannot conclude that there is a "but for" relationship betweeen this litigation and all of the benefits achieved by the memorandum of understanding; I do find that plaintiffs' counsel and the pendency of these claims had a substantial and important role in the achievement of

those benefits.

Finally, as to the notion that defendants are here motivated to agree to the settlement (including the fee application) simply to protect themselves from later litigation, I note that counsel for Beatrice has represented to the Court that the subject of a fee was not discussed between defendants' counsel and plaintiff's counsel "until after there had been specific agreement on each of the substantive terms" of the memorandum of understanding. Secondly, putting aside the slippery question of motive, I have concluded that the settlement is fair.

Finally, I have considered the request of Mr. Leighton to defer ruling on the pending application based upon his view of federal law. I find in Mr. Leighton's submission no persuasive basis to delay acting on the matter now

before me.

VI.

Turning to the application of some 21 law firms, representing plaintiffs in various of the actions involved, for an award of fees, I note initially several preliminary points. First it is proper to make such an award from the benefit created by a class or derivative action, Gottlieb v. Heyden Chemical Corp.,Del.Supr., 105 A.2d 461 (1954). Our courts have frequently acknowledged the appropriateness in derivative or class litigation of spreading the costs of litigation fairly among those who benefit by it by awarding to successful attorneys a fee to be paid from the fund created by the litigation. See, e.g. Sugarland Industries, Inc. v. Thomas,Del.Supr., 420 A.2d 142 (1980).

Second, I note that the benefits to be realized by the members of the class

from the memorandum of understanding, will not be reduced in any respect by the award of an attorney's fee in this instance since such an award will be paid by Beatrice (and thus by KKR or others who may own Beatrice following the merger).

In Allied Artists Pictures Corp., v. Baron, Del.Supr. 413 A.2d 876 (1980), our Supreme Court set forth the appropriate tests to determine whether counsel in a derivative case that has not gone to judgment had placed themselves in a position to benefit from the rule that permits the award of attorneys' fees in such cases. In Allied Artists the Supreme Court applied a three-fold test:

> ... Plaintiffs' counsel would be entitled to attorneys' fees and costs where: the suit was meritorious when filed [1]; action producing benefit to the corporation was taken by the

defendants before a judicial resolution was achieved; and the resulting corporate benefit was causally related to the lawsuit. 413 A. 2d at 878.

Where this test is met, it does not, of course, inform the Court's discretion as to the amount of an appropriate fee, but rather simply indicates that a fee is appropriately awarded. The pending application does present, in my opinion, some question as to the third element of the Allied test. In the typical case challenging the fairness of the terms of a merger, where the merger terms are improved following institution of the lawsuit, there is little question that the lawsuit itself was the principal and perhaps the sole reason for such improved terms. That is so because most frequently in cases of this kind the defendants stand on both sides of the transaction and have no

incentive to unilaterally improve the terms of an announced merger. See, e.g. Joseph v. Shell Oil Co., Del. Ch., C.A. No. 7450, Hartnett, V.C. (April 19, 1985).

In contrast, in this instance since the board of Beatrice was itself independent of KKR, there is no reason for the Court to assume that that board would not have attempted to negotiate the best available terms following receipt of the January 8, 1986, KKR modified offer. Certainly I cannot say, as one could say in a more typical shareholder challenge to a cash-out merger that is terminated with improved terms,that but for the shareholder litigation those improved terms would not have been achieved.

However, in these circumstances, the law presumes a causal connection between plaintiffs' efforts and the benefits. McDonnell Douglas Corp. v.

Palley, Del.Supr., 310 A.2d 635 (1973). But beyond that, having questioned counsel both for plaintiffs and for Beatrice at the hearing on the pending applications on the subject, I am in fact persuaded that plaintiffs' counsel and this litigation played a significant part in achieving the benefits contemplated by the memorandum of understanding. In these circumstances, I conclude that the tests of Allied Artists is met;that is, I conclude that the benefit is causally related to the lawsuit. I turn then to the question of what fee is appropriate in these circumstances.

In fixing the amouont of an award in these circumstances, the Court is called upon to exercise discretion informed by all of the pertinent circumstances. Krinsky v. Helfand,Del. Supr., 156 A2d 90 (1959). As this Court

has recently noted:

> The determination of reasonableness is the end result of a process that requires the Court to consider and weigh a host of subsidiary factors, which include :
>
> (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation and ability of the lawyer or lawyers performing the service; and
>
> (8) whether the fee is fixed or contingent.

Fox v. Chase Manhattan Corp., Del. Ch. C.A. No. 8192-85, Jacobs, V.C. (December 9, 1985).

Here, twenty-one law firms have represented plaintiffs in the sixteen actions covered by this application. Some ten thousand pages of documents were produced and depositions in several states were conducted. The work was doubtlessly intensive when required since I am informed that 4,800 hours of time were dedicated to the case which has been relatively short-lived.

The results as measured by the memorandum of understanding have been very beneficial. Plaintiffs calculate the total financial benefit to the class to be more than $200 million and the record supplies justification for such evaluation. The application is for an award of $3,200,000.

Petitioners' counsel include among their number highly experienced and competent counsel who specialize in prosecuting shareholder claims. In this

litigation, as in most litigation of this kind, remuneration of plaintiffs' counsel lis entirely contingent upon achieving a result beneficial to the shareholders of the company on whose behalf the action is prosecuted legally.

The specific role of this litigation in achieving the benefits involved cannot finely be fixed without a great deal of inquiry which --- since neither Beatrice nor KKR oppose the fee application --- no party has a financial interest in pursuing. It does seem clear that this litigation and the attorneys prosecuting it did have some significant role in achieving those benefits. Since the application is for a small percentage of those benefits (1.6% assuming the $200 million value mentioned above) and will be paid directly by Beatrice and not the class, I am persuaded that the amount

requested is fair and reasonable in the light of the work involved, the contingent nature of the undertaking and the other appropriate factors.

For the foregoing reasons, I have today signed the form of final order consented to by all the parties and supplied to the Court at the hearing on the pending application.

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[1] In this context "meritorious" means capable of withstanding a motion to dismiss if, at the same time, plaintiff possesses knowledge which holds out some reasonable likelihood of ultimate success. Chrysler Corporsation v. Dann, Del. Supr. 223 A.2d 384 (1966). I regard the complaint as stating fairly litigable claims and thus conclude for these purposes it is "meritorious" as that term is used in Dann.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

In re Beatrice Companies, Inc. Litigation

Consolidated Civil Action No. 8248

ORDER AND FINAL JUDGMENT

On this 16th day of April, 1986, a hearing having been held before this Court to determine whether the terms of the Stipulation and Agreement of Compromise and Settlement, dated March 11, 1986 (the "Stipulation"), and all transactions referred to therein or preparatory or incident thereto, and all such transactions taken as whole, are fair, reasonable and adequate for the settlement of all claims asserted herein; and whether judgment should be entered in this consolidated civil action (the"Action") dismissing on the merits with prejudice as against the plaintiffs and all holders (other than defendants)

of Beatrice Common Stock, Beatrice Preference Stock and all holders (other than defendants) of any security convertible into or exercisable for Beatrice Common Stock (including Warrants and Convertible Debentures) at the close of business on February 20, 1986 and their successors in interest or transferees, immediate and remote, and as against Beatrice Companies, Inc. ("Beatrice") with respect to the purported derivative claims; and the Court having considered all matters submitted to it in this Action at the hearing and otherwise; and it appearing that a notice of the hearing substantially in the form approved by the Court was mailed to all holders of record (other than defendants) of Common Stock and Preference Stock of Beatrice and to all holders (other than defendants) of any security convertible into or

exercisable for Beatrice Common Stock (including Warrants and Convertible Debentures) at the close of business on February 20, 1986, as shown by the records of Beatrice, at the respective addresses set forth in such records; and it appearing that a short form notice of the Hearing substantially in the form approved by the Court was published in the national and international editions of The Wall Street Journal on March 13 - 14, 1986; and that Beatrice has used reasonable efforts to give notice to all beneficial owners of such securities who were such owners at the close of business on February 20, 1986,

NOW, THEREFORE, IT IS HEREBY ORDERED that :

1. The Stipulation and Settlement and all transactions referred to therein or preparatory or incident thereto, and all such transactions taken

as a whole, are approved as fair, reasonable and adequate, and the parties are directed to consummate the Settlement in accordance with the terms and provisions of the Stipulation.

2. The Action is hereby dismissed on the merits as to all defendants and with prejudice against plaintiffs and all members of the certified class and against Beatrice with respect to the purported derivative claims, without costs except as provided in the Stipulation, such dismissal being subject only to compliance by the parties with the terms and conditions of the Stipulation and any Order of this Court with reference to the Stipulation.

3. Plaintiffs and all members of the certified class are hereby permanently barred and enjoined from instituting or prosecuting, either directly, representatively, derivatively

or in any other capacity, any other action against anyone asserting claims which are Settled Claims as defined in the Stipulation.

4. The plaintiffs' attorneys are hereby awarded the sum of $3,200,000 in fees inclusive of disbursements in connection with the Action, which sum the Court finds to be fair and reasonable sand which shall be paid to plaintiffs' attorneys by Beatrice in accordance with the Stipulation.

5. Jurisdiction is hereby reserved over all matters relating to the administration and consummation of the terms of the Stipulation and the payment of attorneys' fees and expenses.

/s/ William T. Allen,

Chancellor

CONSENTED TO :

MORRIS & ROSENTHAL, P.A., by /s/ J.A. Rosenthal, *** on behalf of all plaintiffs

RICHARDS, LAYTON & FINGER, by /s/ R. Franklin Balotti, *** on behalf of

defendants Beatrice Companies, Angelo R. Arena, Bernard A Monaghan, Omer G. Voss, Murray L. Weidenbaum, Alexander Brody, G.A. Constanzo, Walter J. Leonard, Goff Smith, James W. Cozad, Cedric E. Ritchie, William G. Karnes, Jayne B. Spain, Russell Wagner, William W. Granger, Jr., David E. Lipson, Frank E. Grzelecki, Antony Luiso, William S. Mowry and Richaard J. Pigott

POTTER, ANDEERSON & CORROON, by /s/ Robert K. Payson * * * on behalf of defendants Kohlberlg Kravis Roberts & Co. and Joel B. Smilow

LASSEN SMITH KATZENSTEIN & FURLOW, by /s/ Craig B. Smith *** on behalf of defendant James L. Dutt

COURT OF CHANCERY

OF THE STATE OF DELAWARE

William T.Allen, Chancellor

Courthouse, Wilmington, Delaware 19801

April 25, 1986

Re: Beatrice Companies, Inc. Litigation

Civil Action No. 8248

Dear Mr. Leighton:

I have received your letter of April 21, 1986, concerning the captioned matter. The Court's memorandum opinion and order dated April 16, 1986, reflects my best judgment concerning the appropriate disposition of the motions there treated. Therefore, treating your letter as a motion for reargument, I will decline to modify that order in any respect.

Very truly yours,

/s/ William T. Allen

IN THE SUPREME COURT

OF THE STATE OF DELAWARE

In re Beatrice Companies, Inc. Litigation

No. 155 and 156, 1986, Consolidated

Court below - Court of Chancery for the State of Delaware in and for New Castle County - C.A. 8248, Consolidated

Submitted : May 21,1986
Decided: June 11, 1986

O R D E R

This 11th day of June, 1986, it appears to the Court that :

(1) On April 16, 1986, the Court of Chancery entered in the Consolidated Civil Action No. 8248 an Order and Final Judgment (the order) approving as fair, reasonable and adequate the terms of a Stipulation and Agreement of Compromise dated March 11, 1986 (the settlement). The petitioner, Leighton, has moved in this Court to vacate the order and to

remand the matter to the trial court for the entry of a new order. Alternatively, Leighton seeks a stay of the order.

(2) Leighton alleges certain deficiencies in the order, including a failure to identify the scope of the class affected, purportedly in violation of Chancery Court Rule 23(c)(3), a failure to name the class representative, and the improper incorporation into the order, by reference to the stipulation, of the terms of the preclusive effect of its injunction, in violation of Chancery Court Rule 65(d).

(3) Chancery Court Rule 23(c)(3) requires that the judgment shall include and describe those found by the Court to be members of the class. The order, the stipulation of settlement and compromise, the order directing issuance of notice and the approved form of notice actually

sent to the Beatrice stockholders, all identified the class affected by the settlement. Although Rule 23 does not require that the Court name the class representatives, their status and identity were recognized in the Court's order, dated March 11, 1986, directing notice to the class.

(4)Contrary to appellant's assertion, the order complies with Rule 65(d) in listing the acts to be restrained, including an injunction prohibiting all the class members from asserting settled claims. See Ezzes v. Ackerman, Del. Ch. 234 A.2d 444 (1967). Moreover the rule permits incorporation by reference if the incorporated document is distributed to the restrained party as well. This requirement was satisfied by distribution to the class members of the notice, which specifically details the

settled claims. Leighton claims that he was not served with the stipulation; howeveer, he is not a member of the class and there is no requirement of distribution to him.

(5) Regarding appellant's motion to remand for a determination on the merits of his unsupported charges of "fee splitting", this issue was not raised below and we will not consider it now. Supreme Court Rule 8.

NOW,THEREFORE IT IS ORDERED that appellant's motion be, and the same hereby is,

DENIED.

BY THE COURT:

/s/ A.G. Moore, II

Justice

IN THE SUPREME COURT

OF THE STATE OF DELAWARE

In re Beatrice Companies, Inc. Litigation

No. 155 and 156, 1986, Consolidated

Court below - Court of Chancery for the State of Delaware in and for New Castle County - C.A. 8248, Consolidated

Submitted :July 7, 1986

Decided : August 15, 1986

O R D E R

This 15th day of August, 1986, the Court having considered appellants' opening briefs in support of their appeals and appellees' motion to affirm pursuant to Supreme Court Rule 25(a), this Court has concluded that it is not manifest on the face of the briefs that the appeal is without merit. The Court requests however, that in the further briefing the parties give particular attention to the issues raised in Points

IV, VI, VII and VIII of appellant Leighton's opening brief.

NOW THEREFORE, IT IS ORDERED that the appellees' motions to affirm are DENIED.

/s/ANDREW D. CHRISTIE

Chief Justice

IN THE SUPREME COURT

OF THE STATE OF DELAWARE

In re Beatrice Companies, Inc. Litigation
No. 155 and 156, 1986, Consolidated
Court below - Court of Chancery for
the State of Delaware in and for New
Castle County - C.A. 8248, Consolidated

O R D E R

This 17th day of February, 1987, appellant William Leighton having moved to supplement the record by letters dated October 24, 1986, November 1, 1986 and February 10, 1987, it appears to the Court that :

(1) This case was submitted on briefs on November 6, 1986 and is currently under consideration.

(2) Leighton's letters concerning a notice to BCI debenture holders, the fee arrangement of one of Beatrice's counsel, and alleged insider trading by one of Beatrice's counsel are irrelevant

to the merits of the pending case.

NOW, THEREFORE, IT IS ORDERED, sua sponte, that apellant William Leighton's requests to supplement the record are DENIED.

/s/ Henry R. Horsey

Justice

IN THE SUPREME COURT OF
THE STATE OF DELAWARE

In re Beatrice Companies, Inc. Litigation No. 155 and 156, 1986, Consolidated

Court below - Court of Chancery for the State of Delaware in and for New Castle County - C.A. 8248, Consolidated

Submitted :November 6, 1986

Decided : February 20, 1987

Before CHRISTIE, Chief Justice, HORSEY AND MOORE, Justices.

O R D E R

This 20th day of February, 1987, upon consideration of the briefs of the parties, it appears to be Court that :

(1)Appellants, Willilam Leighton ("Leighton") and Joseph A. and Shirley S. Yablonski ("the Yablonskis"), appeal from a decision of the Court of Chancery approving the settlement and dismissal of consolidated stockholders' class and derivative actions against Beatrice Companies, Inc. ("Beatrice")' Kohlberg,

Kravis, Roberts & Co. ("KKR"); and Joel E. Smilow, a member of the KKR investment group. The settlement disposed of all claims arising out of the acquisition of Beatrice, through a leveraged buy-out, organized by KKR.

(2) On October 16, 1985, KKR submitted to Beatrice's Board of Directors an offer to acquire the company in a transaction in which Beatrice's stockholders would receive $40 in cash and preferred stock valued at $5 per share for each share of Beatrice common stock. The Board however, after consulting its investment bankers, unanimously rejected the offer as inadequate.

(3)On October 29, 1985, KKR made a second proposal in which it increased its offer to $40 in cash

and $7 in market value of preferred stock. The Board authorized management to begin discussions with KKR in respect to its revised offer and to explore alternatives that would maximize the value of Beatrice to its stockholders. Thereafter, Beatrice's investment bankers contacted approximately seventy-five potential buyers to determine whether they were interested in acquiring all or part of Beatrice. In response to these inquiries, Dart Group Corp. expressed an interest in acquiring Beatrice for $48 per share in cash.

(4) On November 12, 1985, KKR made a revised offer to acquire Beatrice in a transaction consisting of $43 in cash and preferred stock valued at $7 per share. This offer, however contained the following

conditions : (a) a provision (the "Termination Payment Provision") that, if the acquisition was not completed and another party acquired thirty percent of Beatrice's common stock or made a firm proposal to acquire Beatrice for more than $50 per share, KKR would be entitled to a cancellation fee of $123 million; and (b) a provision (the "Asset Option Provision") granting KKR an option to purchase either Beatrice's grocery food and Tropicana subsidiaries for $2.391 billion or certain alternative assets, including the Tropicana subsidiary, for a price of $2.412 billion. The November 12 offer was conditioned upon its acceptance by the Board by no later than November 13, 1985.

(5) On November 13 and 14, 1985, at a special Board meeting, Beatrice's investment bankers indicated that from a

financial point of view, KKR's November 12 offer was fair to Beatrice's stockholders. The Board also learned that the Dart Corp. had withdrawn its earlier offer. Additionally, KKR agreed to cause Beatrice, after the proposed merger, to honor amendments to existing executive compensation and severance agreements that the Board had authorized prior to the initial KKR proposal.

(6) On November 14, 1985, the Board accepted KKR's November 12 offer and entered into (a) a merger agreement with BCI, a corporation KKR formed for the acquisition, which included the Termination Payment Provision; and (b) a separate agreement with BCI adopting the Asset Option Provision. The merger agreement also prohibited the solicitation of alternative proposals or offers for Beatrice or any of its subsidiaries.

(7) Plaintiffs filed nine class

and derivative claims in the Court of Chancery and seven related actions were filed in Illinois. These actions were subsequently consolidated in this proceeding. The complaints basically alleged (a) that Beatrice's officers and directors, aided and abetted by KKR, had breached their fiduciary duties to the Beatrice stockholders in entering into the merger agreement and the executive compensation and severance agreements; and (b) that the Termination Payment Provision was excessive and illegal and the Asset Option Provision invalid. Plaintiffs sought damages, an order enjoining the operation of the Termination Payment and Asset Option Provisions; and an order enjoining consummation of the proposed merger.

(8) Following extensive negotiations between Beatrice, KKR, and

the plaintiffs, the parties entered into a memorandum of understanding on February 1, 1986. The memorandum terminated the agreement containing the Asset Option Provision; reduced the $123 million Termination Payment Provision to approximately $19 million; revised the merger agreement to delete the no-shopping provision, thus, allowing Beatrice to solicit other offers or proposals; confirmed Beatrice's right to pay a cash dividend of up to $.45 per share of common stock; and increased the annual interest rate on the BCI preferred stock issue in connection with the merger from 14 percent to 15-1/4 percent to be paid on a quarterly instead of a semiannual basis. Beatrice and its executives also agreed to reductions of $23 million in their executive compensation and severance agreements.

(9) On March 11, 1986, the parties entered into a stipulation and agreement of settlement in accordance with the terms of the memorandum. Thereafter, the Court of Chancery certified a class consisting of all Beatrice stockholders at the close of business on February 20, 1986 (the record date for the stockholder vote on the proposed merger) and ordered a hearing to determine if the settlement was fair and adequate. Notice of the hearing was mailed to the February 20 holders of record, advising them of their right to appear and object.

(10) Although Leighton and the Yablonskis did not appear at the hearing, both parties submitted written statements objecting to the settlement. Leighton objected on the grounds that BCI was in violation of the various provisions of the federal securities laws. The Yablonskis challenged the

certification of the class, the conduct of the parties' attorneys, the adequacy of the terms of the proposed settlement, and the plaintiffs' attorneys' fee request.

(11) After careful review, the Court of Chancery determined that the benefits provided to Beatrice and the class constituted "fair and reasonable compensation for the claims". The Court also found the application of plaintiffs' counsel for attorneys' fees to be "fair and reasonable in the light of the work involved, the contingent nature of the undertaking and the other appropriate factors."

Thereafter, on April 16, 1986, the Court entered an order dismissing the claims with prejudice.

(12) On appeal, Leighton raises numerous arguments, many of which were

not raised below, based upon provisions of the federal securities laws. Leighton, however, concedes that he did not purchase his Beatrice stock until sometime afater : (a) the time of the Beatrice directors' alleged breach of fiduciary duty; (b) February 20, 1986, the record date for the stockholder vote on the proposed merger; and (c) he reviewed the March 11, 1986 proxy statement and the terms of the merger and settlement.

(13) Under settled Delaware law, an objector who purchases a claim by buying stock after the alleged wrongdoing has occurred lacks standing to challenge the wrongdoing in a derivative capacity. See 8 Del.C. Sec. 327; Newkirk v. W.J. Rainey, Inc. Del. Ch., 76 A.2d 121, 123 (1950). Section 327 provides that a plaintiff cannot maintain a derivative

action challenging corporate mismanagement unless he was a stockholder at the time of the transaction complained of or had his stock devolve upon him by operation of law. 8 Del.C. Sec. 327. The purpose of this section is to prevent potential plaintiffs from purchasing stock in order to maintain a derivative action attacking a transaction which occurred prior to the purchase of the stock. Schreiber v. Bryan, Del. Ch. 396 A.2d 512, 516 (1978); Jones v. Taylor,Del.Ch. 348 A.2d 188, 191 (1975); Newkirk, supra.

(14) In the case of a proposed merger, the plaintiff must have been a stockholder at the time the terms of the merger were agreed upon because it is the terms of the merger, rather than the technicality of its consummation, which are challenged. Newkirk, supra. Therefore, Leighton clearly lacks

standing to challenge derivatively the merger; and he concedes he does not meet class certification. Therefore, his claims must be dismissed.

(15) The Yablonskis assert essentially two arguments; one, the settlement was not fair and reasonable to the shareholders because it extinguished valuable claims for inadequate consideration; and that as to absentee shareholders, the settlement procedures lacked due process; and two, that the Chancery Court abused its discretion in its award of attorneys fees.

(16) The Yablonskis' due process aragument was not raised prior to or at the settlement hearing, which the Yablonskis did not attend. It was included in a post-hearing letter to the Court by the Yablonskis, taking exception to the

> proliferating abuse of the class action mechanism to extinguish legitimate damage claims, to insulate corporate wrongdoers from judicial scrutiny and to sanction the payment of grossly excessive, wholly-unwarranted attorneys fees to class counsel by an opposing party. My due process rights and the due process rights of thousands of other Beatrice stockholders require, at a minimum, close scrutiny if not presumptive invalidity of settlements such as the one involved here.

An examination of the record and of the Court of Chancery's careful consideration of the issues that were timely raised require rejection of the asserted due process claim as factually and legally unsubstantiated. Here, there is no assertion that the settlement procedure of the derivative and class suits did not fully comply with the controlling rules of the Court of Chancery, Rules 23 and 23.1. Thus, weid v. Valhi, Inc., Del. Supr., 466 A.2d 9 (1983), upon which the

Yablonskis rely, is clearly inapposite.

(17) The Yablonskis' due process argument is simply an inarticulated use of a code word for their principal assertion that the settlement was "intrinsically unfair" and is, thus, subsumed within their argument one, attacking the fairness of the settlement to the Beatrice shareholders.

(18) Our standard of review of the settlement of a class or derivative action is well established. This Court should "review the record solely for the purpose of determining whether or not, by the exercise of his business judgment, the Chancellor abused his discretion." Neponsit Inv. Co. v. Abramson, Del. Supr., 405 A.2d 97, 100 (1979). It is not our function to determine the intrinsic fairness of the settlement or to exercise our own business judgment

respecting the merits. Polk v. Good, Del. Supr., 507 A.2d 531, 536 (1986). Rather we limit ourselves solely to the question of whether the Court abused its discretion in exercising its business judgment. Polk, supra. If its findings are supported by the record and are the product of an orderly and logical deductive process, they will be accepted. Levitt v. Bouvier, Del. Supr., 287 A.2d 671, 673 (1972).

(19) The Court --- after considering the benefits conferred on Beatrice's stockholders due to the negotiated changes, the financial improvements that the settlement contemplated, and the arguments of the stockholders who objected to the merger --- concluded that the settlement was fair and reasonable. Based upon our review of the record, we find ample evidence to support the Chancellor's

conclusion that "both Beatrice and the class . . . will receive real and substantial benefits from the settlement." Accordingly, the Court of Chancery did not abuse its discretion in approving the proposed settlement.

(20) Our standard of review of the Yablonskis' second argument, two is whether the Court abused its discretion in its award of attorneys' fees. Krinsky v. Helfand, Del. Supr., 156 A.2d 90, 95 (1959). Here, the Court found that "the amount requested is fair and reasonable in the light of the work involved, the contingent nature of the undertaking and the other appropriate factors." The record discloses that the Court properly considered counsel's time and effort in the lawsuit and the Court's reasoning for its conclusion. It also weighed the amount of the award with the benefits the

Beatrice stockholders received. Hence, we find no abuse of discretion and conclude that the Court properly approved the application for attorneys' fees.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Court of Chancery be and the same is

AFFIRMED.

BY THE COURT:

/s/ Henry R. Horsey

Justice

IN THE SUPREME COURT

OF THE STATE OF DELAWARE

In re Beatrice Companies, Inc. Litigation Nos. 155 and 156, 1986, Consolidated

Court below - Court of Chancery for the State of Delaware in and for New Castle County - C.A. 8248, Consolidated

Submitted : March 9, 1987

Decided : March 24, 1987

O R D E R

This 24th day of March, 1987, the Court having considered appellant William Leighton's Motion for Reargument pursuant to Rule 18 filed March 9, 1987, and it appearing that the Motion is without merit, NOW, THEREFORE, IT IS ORDERED that the appellant's Motion be, and the same hereby is DENIED.

BY THE COURT :

/s/ Henry R. Horsey

Justice

COURT OF CHANCERY
OF THE STATE OF DELAWARE

William T. Allen, Chancellor
Courthouse, Wilmington, Delaware 19801

June 23, 1987

Messrs. Leighton, Payson, Balotti and
Rosenthal

Re : Beatrice Companies Litigation

Civil Action No. 8248

Gentlemen:

William Leighton, claiming to be a member of the class on whose behalf the captioned class action was litigated has moved "pursuant to the reservation of jurisdiction contained in the Order and Final Judgment of April 16, 1986" to have the Court vacate the judgment asserting that material information was not disclosed to the Court at the time the proposed settlement of this matter was approved pursuant to Rule 23(e). He now seeks, among other things, to have the court order an audit by independent

accountants of the profits realized by defendant Kohlberg, Kravis and Roberts as a result of the merger out of which the litigation grew.

Defendaants resist the request on the bases that (1) the Final Judgment in this matter was affirmed by the Supreme Court and the reservation of jurisdiction goes only to the effectuation of the terms of the settlement, (2) the "new matter" asserted does not meet the tests of Rule 60(b), and (3) in all events, the Supreme Court has held, conclusively, that Leighton had no standing to object to the terms of the merger, having purchased his Beatrice stock after the announcement of the proposed merger.

I have reviewed each of Mr. Leighton's five submissions in support of the requested relief. The claims made therein do not seem to me to meet the test required to open a judgment. See

See Poole v. N.V. Deli Maatschappij, Del. Ch., 257 A.2d 241 (1969). Specifically, the information contained therein does not suggest to me that had assertions of this type been made at the settlement hearing, a different result might likely have occurred. More fundamentally, however, I think defendants are correct that the Supreme Court of Delaware has ruled that Mr. Leighton has, under Delaware law, no standing to litigate any aspect of this matter having acquired his interest in Beatrice with knowledge (or at least notice) of the transaction about which he seeks to complain.

For each of these reasons, the pending motion shall be and is denied.

Very truly yours,

/s/ William T. Allen

cc: Register in Chancery

COURT OF CHANCERY

OF THE STATE OF DELAWARE

William T. Allen, Chancellor

Courthouse, Wilmington, Delaware 19801

July 6, 1987

Messsrs Leighton, Payson, Balotti, and Rosenthal

In re : Beatrice Company Litigation,

Civil Action No. 8248

Gentlemen:

Mr. Leighton has moved for reargument of my June 23, 1987 decision on his motion to open judgment in the captioned case. His letter in support of this latest request for relief, in my opinion, states no reason to deviate from my June 23 opinion. For that reason treating his letter as a motion for reargument, that motion will be denied.

Very truly yours,

William T.Allen

cc: Register in Chancery

COURT OF CHANCERY

OF THE STATE OF DELAWARE

William T.Allen, Chancellor July 24, 1987

Courthouse, Wilmington, Delaware 19801

Mr. William Leighton, 249 West 11th Street, New York, N.Y. 10014

Dear Mr. Leighton:

Your motion to vacate the order of April 16, 1986 in the captioned matter has been denied and your request for re-aargument of that ruling has been considered and denied as well. There is no purpose to be served by supplementing the record on a motion that has been decided. Your submission has, I see, been sent to the Register and so I imagine it will into the file of the matter at some point. I will not purport to now change the record upon which your motion was decided.

Very truly yours,

William T. Allen

cc: Robert K. Payson, Esquire, R. Franklin Balotti, Esquire, Joseph A. Rosenthal, Esquire, Register in Chancery

SUPREME COURT OF DELAWARE

Andrew T. Horsey, Clerk

Cathy L. Howard, Deputy Clerk

July 29, 1987

William Leighton * * *

Robert K. Payson, Esquire * * *

R. Franklin Balotti, Esquire * * *

Joseph A. Rosenthal, Esquire * * *

Re : Leighton v. Beatrice Co. et al.,
No. 231, 1987

The Notice of Appesal was filed in the above captioned matter with the Court on July 22, 1987. Pursuant to Supreme Court Rule 15(a)(i), the appellant's brief and appendix are due on or before September 7, 1987. The appellee's brief and appendix are due 30 days after service of the appellant's brief and appendix.

/s/ A.J. Horsey

Clerk

PROXY STATEMENT

BEATRICE COMPANIES, Inc.

Two North LaSalle Street

Chicago, Illinois 60602

SPECIAL MEETING OF STOCKHOLDERS

to be held April 11, 1986

PROSPECTUS

BCI HOLDINGS CORPORATION

9 West 57th Street, Suite 4170,

New York, N.Y. 10019

This Proxy Statement-Prospectus is being furnished to stockholders of Beatrice Companies, Inc., a Delaware corporation ("Beatrice"), in connection with the solicitation of proxies by the Board of Directors of Beatrice for use at the Special Meeting of Stockholders of Beatrice scheduled to be held on Friday,

April 11, 1986 at 1:00 P.M., New York City time, at the Westin Plaza, Fifth Avenue at 59th Street, New York, New York, and at any and all adjournments or postponements thereof (the "Special Meeting").

At the Special Meeting, stockholders will consider and vote upon a proposal to approve and adopt the Agreement and Plan of Merger, dated as of November 14, 1985 and modified on February 2, 1986 (as restated and modified, the "Merger Agreement"), among Beatrice, BCI Holdings Corporation , a Delaware corporation ("Holdings"), and BCI Merger Corporation, a Delaware corporation and a wholly owned subsidiary of Holdings ("Merger Sub"), pursuant to which (a) Merger Sub will be merged with and into Beatrice (the "Merger"), with Beatrice to be the surviving corporation all of the common stock of which will be

owned directly and indirectly by Holdings and (b) each share of common stock, without par value, of Beatrice (the "Beatrice" Common Stock") outstanding as of the time the Merger is consummated (the "Effective Time"), other than shares as to which appraisal rights are perfected under Delaware law (the "Dissenting Shares") and any shares which are held by Beatrice, Holdings or their subsidiaries (which will be cancelled), will be converted into the right ito receive $40 in cash plus 10/ 25 of a share of Cumulative Exchangeable Preferred Stock, par value $.01 per share, of Holdings (the "Holdings Preferred Stock" all as more fully described herein.

Holdings Preferred Stock will have a liquidation preference of $25 per share and bear cumulative quarterly dividends at an annual rate of 15.25%, payable

when, as and if declared out of funds legally available therefor, subject to significant contractual restrictions on the payment of cash dividends that will be contained in the debt financing agreements relating to the Merger.* * * Subject to contractual restrictions that will be contained in the debt financing agreements relating to the Merger, each share of Holdings Preferred Stock will be exchangeable, at the Option of Holdings, for $25 principal amount of 15.25% Junior Subordinated Debentures Due 2002 of Holdings (the "Exchange Debentures") which will mature on the first interest payment date after the sixteenth anniversary of the Effective Time and bear interest at the same rate as the dividend rate of the Holding Preferred Stock. Interest on the Exchange Debentures, if then issued, for six years

following the Effective Time may, at the option of Holdings, be paid in additional Exchange Debentures in a principal amount equal to the amount of interest not paid in cash. **It is currently anticipated that dividends on the Holdings Preferred Stock and interest on the Exchange Debentures, if then issued, for six years following the Effective Time will be paid in additional shares of Holdings Preferred Stock and additional Exchange Debentures, respectively. * * ***

THE HOLDINGS PREFERRED STOCK TO BE ISSUED IN THE MERGER AND THE EXCHANGE DEBENTURES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROXY STATEMENT-PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

The date of this Proxy-Statement-Prospectus is March 11, 1986

Until June 9, 1986, all dealers effecting transactions in the registered securities, whether or not participating in this distribution, may be required to deliver a prospectus. This is in addition to the obligation of dealers to deliver a prospectus when acting as underwriters and with respect to their unsold allotments or subscriptions.

No. C-6432, In the Supreme Court of Texas

Texaco, Inc. Petitioner, v. Pennzoil Company, Respondent

On Application for a Writ of Error

Brief of the Securities and Exchange Commission, Amicus Curiae

Filed : July 22, 1987

Interest of the Securities and Exchange Commission and Summary of its Position

The Securities and Exchange Commission is the federal agency responsible for the administration and enforcement of the federal securities laws and rules thereunder. The Commission submits this brief amicus curiae to urge that this Court review whether the alleged contract between Pennzoil Company ("Pennzoil") and the Getty entities [1/] -- under which Pennzoil was to purchase Getty Oil Company ("Getty Oil") stock from the J. Paul Getty Museum

(the "Museum") -- violated Commission Rule 10b-13, 17 C.F.R. 240.10b-13.

Rule 10b-13 provides that no person who has made a tender offer for any security "shall, directly or indirectly, purchase, or make any arrangement to purchase, any such security otherwise than pursuant to such tender offer". 17 C.F.R. 240.10b-13 (emphasis added). The purpose of the Rule is to protect shareholders in the tender offer from the harmful effects of purchases or arrangements to purchase made outside, and on terms or conditions different from,the tender offer, and to protect the integrity of the tender offer process by proscribing side deals that could render the tender offer a sham. The Court of Appeals below ruled that Pennzoil did not violate Rule 10b-13 when Pennzoil contracted with the Museum to purchase its Getty Oil stock at the same time that

Pennzoil had a tender offer for Getty Oil outstanding. The court proceeded from the incorrect assumption that Rule 10b-13 is violated only by an actual purchase of stock outside a tender offer, so that Pennzoil could have avoided any violation by obtaining an exemption from the Rule, or withdrawing its offer, prior to the actual purchase of othe Museum's shares.

It is clear , however, that the alleged contract between Pennzoil and Getty constituted an "arrangement" by Pennzoil to purchase Getty stock outside Pennzoil's own tender offer. This arrangement plainly violated Rule 10b-13.[2/] The lower court's construction of the Rule is at odds with the language and purpose of the Rule, is unduly restrictive, and would impede Commission efforts to enforce Rule 10b-13 **as well as private actions brought to enforce the Rule.** (petitioner's emphasis).

Furthermore, it is highly unlikely that, had an exemption been sought, on the basis of the facts in the record, it would have been granted. Pennzoil's agreement called for the Museum to be paid in advance of other shareholders, a timing difference of significant financial advantage to the Museum. In addition, while the Museum's payment was certain, the other shareholders' payment was conditioned on approval of a merger agreement. The record discloses no firm plan for compensating the other shareholders for these differences.

Finally, Pennzoil's contention that, to have violated Rule 10b-13, its transaction had to have been entered into with fraudulent intent, is wholly without basis. The Rule proscribes all transactions outside of a tender offer, not only those that are fraudulent. The

narrow construction of the Rule that Pennzoil urges would seriously impair the investor protections that the Rule, and the statutory provisions it is intended to implement, provide

To put the Rule 10b-13 issue in context here, Texaco, Inc. ("Texaco") argues that if the contract was in violation of the Rule, it was an illegal contract and therefore void, either under Section 29(b) of the Securities Exchange Act of 1934 [3/] or under state law, or was at least voidable by an appropriate party. Texaco urges that if the contract is void or voidable, it cannot be held liable for tortious interference with the contract. Pennzoil argues that there was no Rule 10b-13 lviolation and that Texaco has no standingto raise that issue.

The Commission will discuss the proper construction of Rule 10b-13 and the question of whether there was, on the

facts of this case, a violation of the Rule. The scope of Rule 10b-13 is a matter whose significance extends well beyond this case and the Commission believes it should therefore address that issue, and urge review of the issue by this Court. The Commission will not address any other issue in this case, including the ultimate issue of whether Texaco is liable for tortious interference with the alleged contract, and takes no position as to the outcome of this case. * * *

1/ The Getty entities" refers to, collectively, the Getty Oil Company, the J. Paul Getty Museum, and the Sarah C. Getty Trust.

2/ While Pennzoil could have sought an exemption from the Rule from the Commission prior to entering into the alleged contract, it never sought, much less obtained, one at that or any other time.

3/ 15 U.S.C. 78cc. Section 29(b) provides, in relevant part :

Every contract made in violation of any provision of this title or of any rule or regulation thereunder * * * shall be void (1) as regards the rights of any person who, in violation of any such provision, rule or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule or regulation * * *.

12/ Such exemptions, the Commission stated in adopting the Rule, are to be granted "only in cases involving very special circumstances." Sec. Exch. Act Rel. No. 8712, 34 Fed. Reg. at 15,839. In addition to the Commission's exemptive authority, the Commission staff may give "no-action" letters in response to written inquiries regarding applicability of the securities laws or rules, such as Rule 10b-13, to proposed transactions. The staff may, in response to such requests, state that if the transaction is carried out as proposed, the staff will not recommend that the Commission task enforcement action. Alternatively, the staff may refuse to express such a "no-action" position. While the Commission virtually never brings

enforcement proceedings where the staff has taken a no-action position, such a no-action letter, unlike a Rule 10b-13 exemption, is not binding on the Commission and does not constitute a Commission determination that no violation has occurred. See, e.g. Professional Care Services, Inc.(available April 15, 1974), (1973-74) Fed. Sec. L. Rep. (CCH), p.79,770. See also Sec. Exch. Act Rel. No. 8410, 33 Fed. Reg. 14,801 (Oct. 3, 1968); III L. Loss, Securities Regulation 1895 (2d ed. 1961).

Supreme Court, U.S.
FILED
SEP 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-304

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM LEIGHTON,

Petitioner,

v.

BEATRICE COMPANIES, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

BRIEF FOR RESPONDENTS IN OPPOSITION

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Winston & Strawn

THOMAS F. GING
Isham, Lincoln & Beale

QUESTION PRESENTED

Does this Court have jurisdiction to review by writ of certiorari a judgment of the Delaware Supreme Court holding that petitioner lacked standing under Delaware state law to object to the settlement of state shareholder derivative litigation, having purchased his shares after the transaction at issue in the settled litigation?

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Rule 8, Del. Code Ann.

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* The text of these provisions is reproduced in full at Appendix A hereto.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-304

WILLIAM LEIGHTON,

Petitioner,

v.

BEATRICE COMPANIES, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents[1] respectfully submit that the petition of William Leighton for a writ of certiorari should be denied.

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1 Respondents' Supreme Court Rule 28.1 Statement appears at Appendix B hereto. Respondents are defendants below, Beatrice Companies, Inc., various of its directors at the time of the acquisition challenged in the litigation, William W. Granger, Jr., Frank E. Grzelecki, David E. Lipson, Anthony Luiso, William S. Mowry, Richard J. Pigott, Angelo R. Arena, Bernard A. Monaghan, Omer G. Voss, Murray L. Weidenbaum, Alexander Brody, G.A. Costanzo, Walter J. Leonard, Goff Smith, James W. Cozad, Cedric E. Ritchie, William G. Karnes, Jayne B. Spain and Russell Wagner, Kohlberg Kravis Roberts & Co. ("KKR"), Joel E. Smilow, a member of the KKR investor group, and, although petitioner does not include them in the list of parties in his petition, plaintiffs below, Bertha Watkins, Ernest Brooks, III, Harold Sachs, Irving S. Hook, Stuart D. Wechsler, United Operating Company, Leonard Barkan, Sam Wietschner, Bernard Lowe, Ruth Rosenbluth, Peter Nemphos and Louis Nemphos, as joint tenants, Harry Lewis, The Martha & Regina Brand Foundation, Inc., Jean C. Osajda, SCB Co., Josephine Freeman, Robert A. Weiss, Louis Klein, Gary Slavik, Allan L. Kovacs and Gertrude Flacks, and defendant below James L. Dutt, a former officer of Beatrice Companies, Inc.

JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(3) (1982). For the reasons discussed below, respondents respectfully submit that this Court is without jurisdiction to issue a writ of certiorari to review the decision of the Delaware Supreme Court.

COUNTERSTATEMENT OF THE CASE

The petition herein arises out of the settlement of a series of consolidated derivative and class actions in Delaware state court challenging the acquisition of respondent Beatrice Companies, Inc. ("Beatrice") through a merger organized by respondent Kohlberg Kravis Roberts & Co. ("KKR"). Following notice to Beatrice's stockholders and class members and a hearing, the settlement of those actions was approved as fair and reasonable by the Delaware Chancery Court over petitioner's objections. On appeal, the Delaware Supreme Court concluded that petitioner had no standing to object to the settlement because he was not a Beatrice stockholder at the time of the events at issue in the litigation and affirmed the Chancery Court's approval of the settlement. Petitioner seeks review by this Court of the Delaware Supreme Court's decision despite the fact that no federal question was decided because petitioner lacked standing to raise any objection to the settlement.

Background of the Litigation

KKR first proposed an acquisition of Beatrice by means of a merger on October 16, 1985. The Beatrice Board of Directors later voted to accept a revised KKR offer, and on November 14, 1985, Beatrice entered into an acquisition agreement (the "Initial Merger Agreement") with BCI Holdings Corporation ("BCI"), a corporation newly created by KKR, and BCI's subsidiary, BCI Merger Corporation ("BCI Merger"). Litigation began immediately after announcement of the Beatrice

Board's acceptance of KKR's offer. Commencing November 15, 1985, nine derivative and class actions were filed in the Delaware Chancery Court. The suits were consolidated under the caption *In re Beatrice Companies, Inc. Litigation* (the "Consolidated Action"). The Consolidated Action made various allegations arising under state law. Seven suits filed in the Circuit Court of Cook County, Illinois (the "Illinois Actions") contained allegations arising under state law similar to those raised in the Consolidated Action.

In late January 1986, following extended expedited discovery, attorneys for plaintiffs in the Consolidated Action and Illinois Actions engaged in discussions with representatives of Beatrice and KKR. These negotiations culminated in a Memorandum of Understanding dated February 1, 1986, which eliminated the features of the Initial Merger Agreement that plaintiffs found objectionable, improved the consideration that Beatrice stockholders would receive for their shares in the merger, and provided for the settlement of plaintiffs' claims, subject to additional discovery and court approval.[2] After concluding that it was in the best interest of Beatrice and its stockholders, the Board of Directors, the majority of which were disinterested outside directors, approved the proposed settlement set forth in the Memorandum of Understanding and Beatrice, BCI and BCI Merger entered into a Revised Merger Agreement in accordance therewith.

Approval of the Settlement as Fair and Reasonable

Following the completion of discovery, the parties entered into a stipulation of settlement in accordance with the terms of the Memorandum of Understanding, and applied to the Delaware Chancery Court for approval of the proposed settlement. On March 11, 1986, the Delaware Chancery Court, for purposes of settlement, issued an order directing that the Consoli-

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2 Plaintiffs in the Consolidated Action and Illinois Actions subsequently filed an amended complaint in Delaware which contained all of the allegations raised in those actions and the Illinois Actions were discontinued.

dated Action be maintained as a derivative and class action and conditionally certifying a class consisting of all holders of Beatrice stock (other than defendants) at the close of business on February 20, 1986 (the record date for the stockholder vote on the merger), and their successors in interest and transferees.

The Chancery Court also ordered a hearing on the issue of whether the settlement, taken as a whole, was fair and adequate to Beatrice, its stockholders and the class members. The proxy statement issued in connection with the merger was sent to Beatrice's stockholders on March 11, 1986. Petitioner alleges that he purchased an undisclosed number of shares of Beatrice stock some time following March 11, with knowledge of the merger plan and the proposed settlement of the Consolidated Action, both of which were disclosed in the proxy materials. On April 11, 1986, the proposed merger was approved by 98% of those voting at the Beatrice stockholders' meeting and by 81% of Beatrice's outstanding shares.

By letter dated April 4, 1986, and filed with the Chancery Court, petitioner objected to the settlement on various state law grounds and also on the grounds that BCI was in violation of Section 7 of the Securities and Exchange Act of 1934 and Section 7(a) of the Investment Company Act of 1940.[3] Petitioner did not claim that he had standing to object to the settlement as a stockholder of Beatrice, but rather claimed that he was an "offeree" of BCI.

The Delaware Chancery Court conducted a full hearing on the proposed settlement on April 14, 1986. Petitioner did not appear at the hearing. The Chancery Court rendered its opinion on April 16, 1986. (A. 1a)[4] The Chancery Court reviewed in detail the provisions of the transaction and settlement and determined that "both Beatrice and the class on whose behalf these actions are prosecuted will receive real and substantial

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3 Beatrice, its directors and KKR filed a joint response to petitioner's letter, dated April 11, 1986, in which they denied any violation of the federal securities laws.

4 "A." refers to the Appendix to the petition.

benefits" from the settlement. (A. 18a) The Chancery Court concluded that the benefits provided to Beatrice and its stockholders constituted "fair and reasonable compensation for the dismissal of the claims asserted in the amended complaint." (A. 20a) In rendering its opinion, the Delaware Chancery Court specifically considered and rejected petitioner's contentions. (A. 25a-26a)

Petitioner's Challenges to the Delaware Chancery Court's Decision

Petitioner made a broad-based attack on the approval of the settlement in a letter to the Chancery Court dated April 21, 1986. In this letter petitioner claimed for the first time that he was a Beatrice stockholder, but admitted that he had not purchased his stock until after the record date for voting on the proposed merger. In a letter dated April 25, 1986, the Chancery Court informed petitioner that it had treated his letter as a motion for reargument and declined to modify its order in any respect. (A. 41a) Petitioner filed a motion in the Delaware Supreme Court to vacate the Chancery Court's April 16 order approving the settlement. The Delaware Supreme Court denied petitioner's application. (A. 42a)

Petitioner then appealed to the Delaware Supreme Court from the Chancery Court's decision and, in his brief, asserted that he was acting "derivatively on behalf of Beatrice and not representatively on behalf of certified class members," and reiterated his objections to the settlement based upon alleged violations of the federal securities laws.[5] The Delaware Supreme Court, in its decision dated February 20, 1987, dismissed all of petitioner's objections to the settlement, concluding that under Delaware law petitioner had no standing to challenge the merger in a derivative capacity. (A. 50a, 58a-61a) In addition, after a thorough review of the transaction

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5 In his petition to this Court petitioner continues to assert derivative standing only, relying upon Section 327 of the Delaware Corporation Law which governs standing to maintain derivative actions. Del. Code Ann. tit. 8, § 327 (1983).

and settlement, and of the Chancery Court's treatment thereof, the Delaware Supreme Court affirmed in all respects the Chancery Court's decision that the settlement was fair and reasonable. (A. 50a)

On March 9, 1987, petitioner moved the Delaware Supreme Court to reconsider its order of February 20, 1987. On March 24, 1987, the court denied petitioner's motion. (A. 67a)

Subsequent Proceedings

Petitioner has continued his efforts to overturn the settlement. On May 5, May 8 and May 20, 1987, petitioner requested that the Delaware Chancery Court reopen the case and vacate its April 16, 1986 order approving the settlement. On June 23, 1987, the Chancery Court denied petitioner's motions, holding that the arguments submitted by petitioner would not have changed the result had they been submitted at the settlement hearing and that, in any event, as the Delaware Supreme Court had found, petitioner had no standing to litigate any aspect of the matter. (A. 68a, 70a)

By letter dated June 26, 1987, petitioner requested reargument of the Chancery Court's decision of June 23, 1987, which request was denied on July 6, 1987. (A. 71a) On July 20, 1987, petitioner sought leave to supplement the record regarding the denial of his motion to reargue. On July 24, 1987, the Chancery Court denied that application. (A. 72a)

On July 22, 1987, petitioner noticed an appeal to the Delaware Supreme Court from the Chancery Court's decisions of June 23 and July 6, 1987, denying petitioner's motions to reopen the case. That appeal is still pending. Plaintiffs and defendants in the settled actions have moved in the Delaware Supreme Court to dismiss petitioner's appeal, affirm the judgment below and assess costs against petitioner for his protracted litigation of settled questions. Those motions are still pending.

REASONS FOR DENYING THE WRIT

The petition presents for review a state court decision that rests solely on Delaware corporation law. Petitioner has satisfied none of the jurisdictional requisites for issuance of a writ of certiorari.

THIS COURT IS WITHOUT JURISDICTION TO REVIEW THE JUDGMENT OF THE DELAWARE SUPREME COURT BECAUSE PETITIONER DID NOT SPECIALLY SET UP ANY FEDERAL CLAIM UNDER 28 U.S.C. § 1257(3) AND BECAUSE THE JUDGMENT BELOW RESTS ON AN INDEPENDENT AND ADEQUATE STATE GROUND

Petitioner invokes this Court's jurisdiction to review a decision of the Delaware Supreme Court declining to consider his state and federal law objections to the settlement of a derivative action, which decision was based on the fact that, under the law of Delaware, petitioner lacked standing to challenge the settlement. There is no jurisdictional basis for this Court to issue a writ of certiorari and review the Delaware judgment. The jurisdictional statute, 28 U.S.C. § 1257(3) (1982), limits this Court's review on certiorari to instances where a federal claim was properly raised in the state court. Petitioner's lack of standing to object to the settlement of the derivative action on any basis—state or federal—rendered his claims improperly raised. In addition, this Court lacks jurisdiction because the Delaware Supreme Court's decision rests on an independent and adequate state law ground—petitioner's lack of standing. Thus, the Delaware Supreme Court's decision is not subject to review on a writ of certiorari from this Court.

A. No Statutory Basis Exists for this Court to Exercise Jurisdiction Because Petitioner Did Not Properly Set Up A Right Under Federal Law in the Proceedings Below

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(3). While the petition is far from clear, petitioner apparently asserts that he "specially set up" a right under federal law in the state court proceeding.[6] As noted above, federal claims were injected into the Delaware Consolidated Action only by petitioner's assertion that the existence of such potential claims constituted grounds for the state court to reject settlement of that action. The mere fact that federal questions were introduced at some stage in a state court action does not trigger this Court's jurisdiction to issue a writ of certiorari. A party must have *properly* asserted his federal claims. *See Webb v. Webb*, 451 U.S. 493, 499 (1981); *Hartford Life Insurance Co. v. Johnson*, 249 U.S. 490, 493 (1919); *Atlantic Coast Line Railroad Co. v. Mims*, 242 U.S. 532, 535 (1917). *See also* R. Stern, E. Gressman & M. Shapiro, *Supreme Court Practice*, § 3.19 at 145 and n.40 (6th ed. 1986).

A state court's determination, as a threshold matter, that a litigant lacks standing under state law and, therefore, has not properly raised his claims, is a sufficient basis for declining to reach asserted federal claims.[7] *See Cramp v. Board of Public*

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6 While petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(3) and apparently asserts that he "specially set up" federal claims below, he also asserts that it is not his objective to have this Court consider those claims. Rather, petitioner would have this Court grant certiorari solely for the purpose of remanding the case and directing the Delaware Supreme Court to rule on his objections to the settlement based upon alleged federal law violations of the defendants below. (Petition at 30, 33-34)

7 Petitioner suggests that under Delaware Supreme Court Rule 8, the Delaware Supreme Court was prohibited from reaching the standing issue because it was not raised in the Chancery Court. (Petition at 18-

(*Footnote continued on next page*)

Instruction, 368 U.S. 278, 281-82 (1961) (assuming that the Supreme Court would not review a state court decision that a litigant lacked standing in the state court to challenge a state statute on federal constitutional grounds). *Cf. Orr v. Orr*, 440 U.S. 268, 274 (1979); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 334 (1968) (Harlan, J., dissenting) (in deciding whether a question is "specially set up or claimed" under Section 1257(3), "it is relevant and usually sufficient to ask whether the petitioners satisfied the state rules governing presentation of issues"); *Douglas v. New York, New Haven & Hartford Railroad Co.*, 279 U.S. 377, 387 (1929); *John v. Paullin*, 231 U.S. 583, 585 (1913).[8]

Although this Court is not bound by a state court's determination that the federal question was improperly raised, *see*, *Street v. New York*, 394 U.S. 576, 583 (1969); *Parker v.*

(*Footnote continued from previous page*)

19) In the first instance, this Court has no jurisdiction to determine whether the Delaware Supreme Court erred in deciding an issue that arises solely under state law. *International Longshoremen's Association, AFL-CIO v. Davis*, 476 U.S. 380 (1986). In any event, respondents raised the question of standing in an April 11, 1986 submission to the Chancery Court, and petitioner referenced the issue in his responsive letter to the Chancery Court dated April 14, 1986, which was well before his appeal to the Delaware Supreme Court. Moreover, Rule 8 expressly empowers the Delaware Supreme Court to consider and determine any question not presented to the trial court when the interests of justice so require. Petitioner's standing to raise derivative claims on behalf of Beatrice was first considered by the Delaware Supreme Court because it was not until after the Chancery Court's decision that petitioner claimed to have standing as a Beatrice stockholder.

8 Petitioner did not assert any independent basis for his standing to raise any claims in the Delaware courts beyond his standing under Delaware Corporation Law. In any event, nothing suggests that petitioner would have had standing under the federal statutes to which he refers or under Rule 23.1 of the Federal Rules of Civil Procedure. *See* Securities and Exchange Act of 1934, 15 U.S.C. § 78a, *et seq.* (1982); Investment Company Act of 1940, 15 U.S.C. § 80a-1, *et seq.* (1982); Fed. R. Civ. P. 23.1.

Illinois, 177 U.S. 442, 447 (1900), this Court will defer to the rules of the particular state unless it appears that the state's rules exist to deprive litigants any reasonable opportunity to present federal issues. *NAACP v. Alabama*, 377 U.S. 288, 296 (1964); *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964); *Central Union Telephone Co. v. City of Edwardsville*, 269 U.S. 190, 194-95 (1925); *Hartford Life Insurance Co. v. Johnson*, 249 U.S. at 493. In this case, no suggestion is made, or could be made, that the Delaware law rendering petitioner's federal claims improperly raised exists solely to defeat the assertion of valid federal claims in Delaware. As is demonstrated below, Delaware's standing rule serves a valid state purpose equally applicable to federal and state causes of action. *See* Point B, *infra*. Thus, the Delaware Supreme Court's decision that the petitioner had no standing to sue effectively barred petitioner's attempt to set up his federal claims below.[9]

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9 Petitioner apparently also argues that the Delaware Supreme Court was compelled to address his federal claims without regard to his lack of standing. This position is meritless. *See, e.g., John v. Paullin*, 231 U.S. 583, 585 (1913) ("without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts . . . and the rules of practice to be applied in its exercise; and the state law and practice in this regard are not less applicable when federal rights are in controversy"); *see also United States v. Burnison*, 339 U.S. 87, 94-95 (1950); *Miles v. Illinois Central Railroad Co.*, 315 U.S. 698, 704 (1942); *In re Second Employers' Liability Cases*, 223 U.S. 1, 56 (1912).

Finally, although petitioner is less than clear on this point, he also apparently contends that if Section 327 of the Delaware Corporation Law does deprive him of standing to pursue purchased claims, that statute violates the supremacy clause, U.S. Const. art. VI, § 2. (Petition at 30) The petition thus raises an issue which has never been raised before in this litigation. This Court has long refused to issue a writ of certiorari to consider federal claims that are first raised in the petition for certiorari, having no jurisdiction to do so under 28 U.S.C. § 1257(3). *See Webb v. Webb*, 451 U.S. 493, 498-99 (1981); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Ellis v. Dixon*, 349 U.S. 458, 463 (1955). The argument that petitioner now advances was never raised in

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Clearly, petitioner did not properly "set up" a federal claim and thus cannot invoke 28 U.S.C. § 1257(3) as a basis for this Court's jurisdiction.[10]

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the Delaware Supreme Court and thus cannot be the basis for issuance of a writ of certiorari. Petitioner's supremacy clause argument is in any event frivolous. Petitioner does not claim, as he must to establish preemption, either that a provision of federal law expressly preempts the challenged Delaware statutory provision or that the state law is preempted by implication due to an unavoidable conflict with a specific federal law. *See Louisiana Public Service Association v. FCC*, 476 U.S. 355 (1986); *Michigan Canners & Freezers Association, Inc. v. Agricultural Marketing and Bargaining Board*, 467 U.S. 461, 480 (1984).

10 Even if petitioner had properly set up a federal claim below and jurisdiction to grant certiorari existed, issuance of the writ is clearly not warranted in this case. Issuance of a writ of certiorari rests in this Court's sound discretion, and a petition is granted only when there are "special and important reasons therefor." Sup. Ct. R. 17; *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74-75 (1955). Supreme Court Rule 17 sets forth as illustrative of the character of cases which this Court deems "special and important" state court decisions *deciding* important questions of federal law. As petitioner admits, the Delaware Supreme Court did not decide any question of federal law.

Further, the federal questions asserted by petitioner are absolutely devoid of merit. This lack of substantiality provides an independent ground for dismissal of the petition. *See Palmer Oil Corp. v. Amerada Petroleum*, 343 U.S. 390, 391 (1952); *Zucht v. King*, 260 U.S. 174, 176 (1922). Petitioner's contentions that BCI and KKR violated Section 7 of the Securities and Exchange Act of 1934 (the "1934 Act"), 15 U.S.C. § 78g, and Regulations G and U promulgated thereunder, must fail because the transaction at issue is not subject to Section 7 of the 1934 Act. Section 7 was enacted in order to "prevent[ ] the excessive use of credit for the purchase or carrying of securities." 15 U.S.C. § 78g(a). In a merger transaction such as the merger between BCI and Beatrice, the securities of the acquired entity do not constitute margin stock within the meaning of Regulations G and U, because immediately upon the merger, the acquired stock is delisted and no longer publicly held or traded. *See* 12 C.F.R. §§ 207.2(i), 221.2(h) (1987). Moreover, Regulations G and U do not apply to credit extended to

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B. The Delaware Supreme Court's Judgment Rests Upon An Independent and Adequate State Ground and this Court Therefore Has No Jurisdiction to Review that Judgment

This Court has historically held that it lacks jurisdiction to grant a writ of certiorari when the state court judgment to be reviewed rests on an independent and adequate state ground. *Fox Film Corp. v. Muller*, 296 U.S. 207, 209-11 (1935) ("our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment"); *see Michigan v. Long*, 463 U.S. 1032, 1041 (1983) ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision"). This limitation on this Court's jurisdiction is based on the fundamental division of power between the state and

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purchase securities when there is a pre-existing merger agreement between the securities issuer and the purchaser. 12 C.F.R. § 207.112 (1987).

Petitioner's claim that KKR and BCI violated Section 7(a) of the Investment Company Act of 1940 (the "ICA"), 15 U.S.C § 80a-7(a), is similarly without merit because neither entity was an investment company as defined in the statute. Section 3(a) of the ICA defines an investment company as one which issues securities *and* which is engaged (1) primarily in the business of investing, reinvesting, or trading in securities; or (2) in issuing face-amount securities of the installment type; or (3) in investing, reinvesting, owning or trading in securities having a value exceeding 40 per centum of the value of such issuer's total assets. 15 U.S.C. § 80a-3(a). BCI is in the business of owning businesses. Petitioner did not claim and cannot show that BCI is engaged in the business of investing, reinvesting, or trading in securities, Section 3(a)(1), or of issuing face-amount installment certificates, Section 3(a)(2). BCI also does not meet the test of Section 3(a)(3) because the Beatrice securities are not investment securities under the ICA. Likewise, KKR is not an investment company because it is neither an issuer nor an entity engaged in the activities enumerated in Section 3(a).

federal judicial systems. This Court is not empowered to review matters of purely state law. *See Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

The Delaware Supreme Court's judgment was certainly supported by an independent state ground—petitioner's lack of standing to object to the settlement of a derivative state court action. While the Delaware Supreme Court noted that "[o]n appeal, [petitioner] raises numerous arguments, many of which were not raised below, based upon provisions of the federal securities laws" (A. 58a-59a), the court did not reach those arguments. There was no federal ground for the decision. Based exclusively upon an analysis of Delaware law, the Delaware Supreme Court concluded that petitioner "clearly lacks standing to challenge derivatively the merger . . . Therefore, his claims must be dismissed." (A. 60a-61a)

This Court has traditionally found that the independent state law basis of a state court judgment is adequate when the state law is evenly applied and reasonable in purpose. *See, e.g., Wolfe v. North Carolina*, 364 U.S. 177, 194-96 (1960); *Enterprise Irrigation District v. Farmer's Mutual Canal Co.*, 243 U.S. 157, 164-65 (1917); R. Stern, E. Gressman & M. Shapiro, *Supreme Court Practice*, § 3.28 at 179-83. In this case, the adequacy of the independent state ground underlying the Delaware Supreme Court judgment is unquestionable; the Delaware Supreme Court properly applied long-standing Delaware corporation law that is eminently reasonable.

A state stockholder derivative action is a creature of state corporation law, and this Court has repeatedly held that this is an area which Congress clearly and specifically left to state regulation. *Burks v. Lasker*, 441 U.S. 471, 477-78 (1979); *Sante Fe Industries, Inc. v. Green*, 430 U.S. 462, 478 (1977); *Cort v. Ash*, 422 U.S. 66, 84 (1975); *Smith v. Sperling*, 354 U.S. 91, 95 (1957). It is generally accepted that state law governs the determination of whether a stockholder may sue in a derivative capacity in a state stockholder derivative action. *Swanson v. Traer*, 354 U.S. 114, 116 (1957); *cf. Cramp v. Board of Public*

Instruction, 368 U.S. 278, 281-82 (1961) (state standing law bar to constitutional claim will not be reviewed by the Supreme Court).

By Delaware statute, a party cannot maintain a derivative action challenging a corporate transaction unless that party was a stockholder at the time of the transaction complained of or had its stock devolve upon it by operation of law. Del. Code Ann. tit. 8, § 327 (1983).[11] Delaware courts have consistently applied this well-settled principle to bar improper derivative challenges. *See, e.g., Schreiber v. Bryan*, 396 A.2d 512, 516 (Del. Ch. 1978); *Maclary v. Pleasant Hills, Inc.*, 109 A.2d 830, 833 (Del. Ch. 1954); *Newkirk v. W.J. Rainey, Inc.*, 76 A.2d 121, 123-24 (Del. Ch. 1950). In the case of a proposed merger, the plaintiff must have been a stockholder at the time the terms of the merger were agreed upon because it is the terms of the merger, rather than the technicality of its consummation, which are challenged derivatively. *Newkirk v. W.J. Rainey, Inc.*, 76 A.2d at 123-24.

Petitioner simply did not meet the standing requirements of the Delaware law. Petitioner did not become a Beatrice stockholder until after KKR's proposal had been announced, the Initial Merger Agreement had been signed, plaintiffs had commenced numerous actions, conducted extensive discovery and secured substantial benefits in the Memorandum of Understanding, the Revised Merger Agreement had been signed, a settlement in principle had been reached by the parties, the record date for voting on the merger proposal had passed, the stipulation of settlement had been executed, the Chancery Court had certified the class for settlement purposes and had set the hearing date, and the proxy statement had been dissemi-

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11 Petitioner first addressed the standing issue by alleging before the Delaware Supreme Court that he had standing pursuant to Del. Code Ann. tit. 8, § 261 (1983). Section 261 merely preserves claims by or against a merged corporation; it does not confer standing on petitioner and was irrelevant. *See Lewis v. Anderson*, 453 A.2d 474, 479-80 (Del. Ch. 1982), *aff'd*, 477 A.2d 1040 (Del. 1984).

nated.[12] The Delaware Supreme Court found that petitioner, by his own admission, acquired Beatrice stock only after he reviewed the March 11, 1986 proxy statement which set forth the terms of the proposed merger and settlement. (A. 59a) The Delaware Supreme Court thus correctly applied Delaware law to dismiss petitioner's claims.

Moreover, the Delaware standing law applied by the court below is reasonable and is not designed to hinder presentation of federal issues in the state court. *See Broad River Power Co. v. South Carolina*, 281 U.S. 537, 540-41 (1930); *Nickel v. Cole*, 256 U.S. 222, 225 (1921). The salutary purpose of this statute is to discourage would-be plaintiffs from purchasing stock in order to maintain a derivative action attacking a transaction which occurred prior to their purchase. *Schreiber v. Bryan*, 396 A.2d at 516; *Maclary v. Pleasant Hills, Inc.*, 109 A.2d at 833; *Newkirk v. W.J. Rainey, Inc.*, 76 A.2d at 123. The Delaware Supreme Court expressly recognized this purpose in holding that petitioner was without standing to challenge the merger. (A. 60a)

In fact, the Delaware standing statute represents the accepted approach to regulating shareholder derivative actions. *See, e.g.*, N.Y. Bus. Corp. Law § 626(b) (McKinney 1986); Model Business Corp. Act § 49 (1971); *see also* H. Henn & J. Anderson, *The Law of Corporations*, § 62 at 1058-59 (1983). Rule 23.1 of the Federal Rules of Civil Procedure imposes an

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12 Petitioner appears to have a practice of purchasing stock in a corporation after challenged events have transpired for the purpose of contesting the settlement of claims arising out of those events. *See, e.g., Leighton v. One William Street Fund, Inc.*, 343 F.2d 565, 567 (2d Cir. 1965); *Kerner v. Crossman*, 211 F. Supp. 397, 401 (S.D.N.Y. 1962). One court described him as "an habitual *pro se* litigant whose claims [are] often conclusory and lacking in legal merit." *Leighton v. Paramount Pictures Corp.*, 340 F.2d 859, 861 (2d Cir.), *cert. denied*, 381 U.S. 925 (1965). Here, his conduct has prevented—for a year and a half—the disbursement of the court-approved settlement fund to the former Beatrice stockholders.

identical requirement on shareholders suing in a derivative capacity in federal court.[13]

Petitioner cannot obtain review in this Court of the Delaware Supreme Court's rejection of his objections to the settlement because that decision rests upon the independent and adequate state ground that petitioner lacked standing to challenge the merger derivatively.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
September 18, 1987

Respectfully submitted,

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Counsel of Record for Respondents

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13 Rule 23.1 of the Federal Rules of Civil Procedure requires shareholders asserting a derivative action in federal courts to plead (1) that they were shareholders in the corporation at the time of the transaction complained of, and (2) that they are shareholders at the time the action is commenced. The purpose of this provision is to prevent the federal court from being used to litigate purchased grievances or from becoming a party to speculative suits against corporations. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 566-69 (1949). Rule 23.1 has been interpreted by the federal courts in the merger context in the same manner that Section 327 of the Delaware Corporation Law has been interpreted by the Delaware courts in that context. *Compare Crouse-Hinds Co. v. InterNorth, Inc.*, 634 F.2d 690, 693 (2d Cir. 1980), *with Newkirk v. W.J. Rainey, Inc.*, 76 A.2d at 123-24.

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APPENDICES

Appendix A

STATUTORY, REGULATORY AND CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Statutory Provisions

Securities and Exchange Act of 1934

15 U.S.C. § 78g (1982)

(a) For the purpose of preventing the excessive use of credit for the purchase or carrying of securities, the Board of Governors of the Federal Reserve System shall, prior to October 1, 1934, and from time to time thereafter, prescribe rules and regulations with respect to the amount of credit that may be initially extended and subsequently maintained on any security (other than an exempted security). For the initial extension of credit, such rules and regulations shall be based upon the following standard: An amount not greater than whichever is the higher of—

(1) 55 per centum of the current market price of the security, or

(2) 100 per centum of the lowest market price of the security during the preceding thirty-six calendar months, but not more than 75 per centum of the current market price.

Such rules and regulations may make appropriate provision with respect to the carrying of undermargined accounts for limited periods and under specified conditions; the withdrawal of funds or securities; the substitution or additional purchases of securities; the transfer of accounts from one lender to another; special or different margin requirements for delayed deliveries, short sales, arbitrage transactions, and securities to which paragraph (2) of this subsection does not apply; the bases and the methods to be used in calculating loans, and margins and market prices; and similar administrative adjustments and details.

For the purposes of paragraph (2) of this subsection, until July 1, 1936, the lowest price at which a security has sold on or after July 1, 1933, shall be considered as the lowest price at which such security has sold during the preceding thirty-six calendar months.

(b) Notwithstanding the provisions of subsection (a) of this section, the Board of Governors of the Federal Reserve System, may, from time to time, with respect to all or specified securities or transactions, or classes of securities, or classes of transactions, by such rules and regulations (1) prescribe such lower margin requirements for the initial extension or maintenance of credit as it deems necessary or appropriate for the accommodation of commerce and industry, having due regard to the general credit situation of the country, and (2) prescribe such higher margin requirements for the initial extension or maintenance of credit as it may deem necessary or appropriate to prevent the excessive use of credit to finance transactions in securities.

(c) It shall be unlawful for any member of any national securities exchange or any broker or dealer, directly or indirectly, to extend or maintain credit or to arrange for the extension or maintenance of credit to or for any customer—

(1) on any security (other than an exempted security), in contravention of the rules and regulations which the Board of Governors of the Federal Reserve System shall prescribe under subsections (a) and (b) of this section;

(2) without collateral or on any collateral other than securities, except in accordance with such rules and regulations as the Board of Governors of the Federal Reserve System may prescribe (A) to permit under specified conditions and for a limited period any such member, broker, or dealer to maintain a credit initially extended in conformity with the rules and regulations of the Board of Governors of the

Federal Reserve System, and (B) to permit the extension or maintenance of credit in cases where the extension or maintenance of credit is not for the purpose of purchasing or carrying securities or of evading or circumventing the provisions of paragraph (1) of this subsection.

(d) It shall be unlawful for any person not subject to subsection (c) of this section to extend or maintain credit or to arrange for the extension or maintenance of credit for the purpose of purchasing or carrying any security, in contravention of such rules and regulations as the Board of Governors of the Federal Reserve System shall prescribe to prevent the excessive use of credit for the purchasing or carrying of or trading in securities in circumvention of the other provisions of this section. Such rules and regulations may impose upon all loans made for the purpose of purchasing or carrying securities limitations similar to those imposed upon members, brokers, or dealers by subsection (c) of this section and the rules and regulations thereunder. This subsection and the rules and regulations thereunder shall not apply (A) to a loan made by a person not in in the ordinary course of his business, (B) to a loan on an exempted security, (C) to a loan to a dealer to aid in the financing of the distribution of securities to customers not through the medium of a national securities exchange, (D) to a loan by a bank on a security other than an equity security, or (E) to such other loans as the Board of Governors of the Federal Reserve System shall, by such rules and regulations as it may deem necessary or appropriate in the public interest or for the protection of investors, exempt, either unconditionally or upon specified terms and conditions or for stated periods, from the operation of this subsection and the rules and regulations thereunder.

(e) The provisions of this section or the rules and regulations thereunder shall not apply on or before July 1, 1937, to any loan or extension of credit made prior to

June 6, 1934, or to the maintenance, renewal, or extension of any such loan or credit, except to the extent that the Board of Governors of the Federal Reserve System may by rules and regulations prescribe as necessary to prevent the circumvention of the provisions of this section or the rules and regulations thereunder by means of withdrawals of funds or securities, substitutions of securities, or additional purchases or by any other device.

(f) (1) It is unlawful for any United States person, or any foreign person controlled by a United States person or acting on behalf of or in conjunction with such person, to obtain, receive, or enjoy the beneficial use of a loan or other extension of credit from any lender (without regard to whether the lender's office or place of business is in a State or the transaction occurred in whole or in part within a State) for the purpose of (A) purchasing or carrying United States securities, or (B) purchasing or carrying within the United States of any other securities, if, under this section or rules and regulations prescribed thereunder, the loan or other credit transaction is prohibited or would be prohibited if it had been made or the transaction had otherwise occurred in a lender's office or other place of business in a State.

(2) For the purposes of this subsection—

(A) The term "United States person" includes a person which is organized or exists under the laws of any State or, in the case of a natural person, a citizen or resident of the United States; a domestic estate; or a trust in which one or more of the foregoing persons has a cumulative direct or indirect beneficial interest in excess of 50 per centum of the value of the trust.

(B) The term "United States security" means a security (other than an exempted security) issued by a person incorporated under the laws of any State, or whose principal place of business is within a State.

(C) The term "foreign person controlled by a United States person" includes any noncorporate entity in which United States persons directly or indirectly have more than a 50 per centum beneficial interest, and any corporation in which one or more United States persons, directly or indirectly, own stock possessing more than 50 per centum of the total combined voting power of all classes of stock entitled to vote, or more than 50 per centum of the total value of shares of all classes of stock.

(3) The Board of Governors of the Federal Reserve System may, in its discretion and with due regard for the purposes of this section, by rule or regulation exempt any class of United States persons or foreign persons controlled by a United States person from the application of this subsection.

Investment Company Act of 1940

15 U.S.C. § 80a-3(a) (1982):

When used in this subchapter, "investment company" means any issuer which—

(1) is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities;

(2) is engaged or proposes to engage in the business of issuing face-amount certificates of the installment type, or has been engaged in such business and has any such certificate outstanding; or

(3) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis.

As used in this section, "investment securities" includes all securities except (A) Government securities, (B) securities issued by employees' securities companies, and (C) securities issued by majority-owned subsidiaries of the owner which are not investment companies.

15 U.S.C. § 80a-7(a) (1982):

No investment company organized or otherwise created under the laws of the United States or of a State and having a board of directors, unless registered under section 80a-8 of this title, shall directly or indirectly—

(1) offer for sale, sell, or deliver after sale, by the use of the mails or any means or instrumentality of interstate commerce, any security or any interest in a security, whether the issuer of such security is such investment company or another person; or offer for sale, sell, or deliver after sale any such security or interest, having reason to believe that such security or interest will be made the subject of a public offering by use of the mails or any means or instrumentality of interstate commerce;

(2) purchase, redeem, retire, or otherwise acquire or attempt to acquire, by use of the mails or any means or instrumentality of interstate commerce, any security or any interest in a security, whether the issuer of such security is such investment company or another person;

(3) control any investment company which does any of the acts enumerated in paragraphs (1) and (2) of this subsection;

(4) engage in any business in interstate commerce; or

(5) control any company which is engaged in any business in interstate commerce.

The provisions of this subsection shall not apply to transactions of an investment company which are merely incidental to its dissolution.

28 U.S.C. § 1257(3) (1982):

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Delaware Corporation Law

Del. Code Ann. tit. 8, § 327 (1983):

In any derivative suit instituted by a stockholder of a corporation, it shall be averred in the complaint that the plaintiff was a stockholder of the corporation at the time of the transaction of which he complains or that his stock thereafter devolved upon him by operation of law.

Regulatory Provisions

Federal Reserve Board Regulations

12 C.F.R. § 207.2(i) (1987):

(i) "Margin stock" means:

(1) Any equity security registered or having unlisted trading privileges on a national securities exchange;

(2) Any OTC margin stock;

(3) Any OTC security designated as qualified for trading in the National Market System under a designation plan approved by the Securities and Exchange Commission (NMS Security);

(4) Any debt security convertible into a margin stock or carrying a warrant or right to subscribe to or purchase a margin stock;

(5) Any warrant or right to subscribe to or purchase a margin stock; or

(6) Any security issued by an investment company registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a-8), other than:

(i) A company licensed under the Small Business Investment Company Act of 1958, as amended (I5 U.S.C. 661); or

(ii) A company which has at least 95 percent of its assets continuously invested in exempted securities (as defined in 15 U.S.C. 78c(a)(12)); or

(iii) A company which issues face-amount certificates as defined in 15 U.S.C. 80a-2(a)(15), but only with respect of such securities.

12 C.F.R. § 207.112 (1987):

(a) Petitions have been filed with the Board raising questions as to whether the margin requirements in Regulation G apply to two types of corporate acquisitions in which debt securities are issued to finance the acquisition of margin stock of a target company.

(b) In the first situation, the acquiring company, Company A, controls a shell corporation that would make a tender offer for the stock of Company B, which is margin stock (as defined in § 207.2(i)). The shell corporation has virtually no operations, has no significant business function other than to acquire and hold the stock of Company B, and has substantially no assets other than the margin stock to be acquired. To finance the tender offer, the shell

corporation would issue debt securities which, by their terms, would be unsecured. If the tender offer is successful, the shell corporation would seek to merge with Company B. However, the tender offer seeks to acquire fewer shares of Company B than is necessary under state law to effect a "short form" merger with Company B, which could be consummated without the approval of shareholders or the board of directors of Company B.

(c) The purchase of the debt securities issued by the shell corporation to finance the acquisition clearly involves "purpose credit" (as defined in § 207.2(l)). In addition, such debt securities would be purchased only by sophisticated investors in very large minimum denominations, so that the purchasers may be "lenders" for purposes of Regulation G. See 12 CFR 207.2(h). Since the debt securities contain no direct security agreement involving the margin stock, applicability of the lending restrictions of the Regulation turns on whether the arrangement constitutes an extension of credit that is secured indirectly by margin stock.

(d) As the Board has recognized, "indirect security" can encompass a wide variety of arrangements between lenders and borrowers with respect to margin stock collateral that serve to protect the lenders' interest in assuring that a credit is repaid where the lenders do not have a conventional direct security interest in the collateral. See 12 CFR 211.113. However, credit is not indirectly secured by margin stock if the lender in good faith has not relied on the margin stock as collateral extending or maintaining credit. See 12 CFR 207.2(f)(2)(iv).

(e) The Board is of the view that, in the situation described in paragraph (b) of this section, the debt securities would be presumed to be indirectly secured by the margin stock to be acquired by the shell acquisition

vehicle. The staff has previously expressed the view that nominally unsecured credit extended to an investment company, a substantial portion of whose assets consist of margin stock, is indirectly secured by the margin stock. See Federal Reserve Regulatory Service ¶ 5-917.12. This opinion notes that the investment company has substantially no assets other than margin stock to support indebtedness and thus credit could not be extended to such a company in good faith without reliance on the margin stock as collateral.

(f) The Board believes that this rationale applies to the debt securities issued by the shell corporation described above. At the time the debt securities are issued, the shell corporation has substantially no assets to support the credit other than the margin stock that it has acquired or intends to acquire and has no significant business function other than to hold the stock of the target company in order to facilitate the acquisition. Moreover, it is possible that the shell may hold the margin stock for a significant and indefinite period of time, if defensive measures by the target prevent consummation of the acquisition. Because of the difficulty in predicting the outcome of a contested takeover at the time that credit is committed to the shell corporation, the Board believes that the purchasers of the debt securities could not, in good faith, lend without reliance on the margin stock as collateral. The presumption that the debt securities are indirectly secured by margin stock would not apply if there is specific evidence that lenders could in good faith rely on assets other than margin stock as collateral, such as a guaranty of the debt securities by the shell corporation's parent company or another company that has substantial non-margin stock assets or cash flow. This presumption would also not apply if there is a merger agreement between the acquiring and target companies entered into at the time the commitment is made to purchase the debt securities or in any event before loan funds are advanced. In addition, the presumption would not apply if the obligation of the

purchasers of the debt securities to advance funds to the shell corporation is contingent on the shell's acquisition of the minimum number of shares necessary under applicable state law to effect a merger between the acquiring and target companies without the approval of either the shareholders or directors of the target company. In these two situations where the merger will take place promptly, the Board believes the lenders could reasonably be presumed to be relying on the assets of the target for repayment.

(g) In addition, the Board is of the view that the debt securities described in paragraph (b) of this section are indirectly secured by margin stock because there is a practical restriction on the ability of the shell corporation to dispose of the margin stock of the target company. "Indirectly secured" is defined in § 207.2(f) of the regulation to include any arrangement under which the customer's right or ability to sell, pledge, or otherwise dispose of margin stock owned by the customer is in any way restricted while the credit remains outstanding. The purchasers of the debt securities issued by a shell corporation to finance a takeover attempt clearly understand that the shell corporation intends to acquire the margin stock of the target company in order to effect the acquisition of that company. This understanding represents a practical restriction on the ability of the shell corporation to dispose of the target's margin stock and to acquire other assets with the proceeds of the credit.

(h) In the second situation, Company C, an operating company with substantial assets or cash flow, seeks to acquire Company D, which is significantly larger than Company C. Company C establishes a shell corporation that together with Company C makes a tender offer for the shares of Company D, which is margin stock. To finance the tender offer, the shell corporation would obtain a bank loan that complies with the margin lending restrictions of Regulation U and Company C would issue

debt securities that would not be directly secured by any margin stock. The Board is of the opinion that these debt securities should not be presumed to be indirectly secured by the margin stock of Company D, since, as an operating business, Company C has substantial assets or cash flow without regard to the margin stock of Company D. Any presumption would not be appropriate because the purchasers of the debt securities may be relying on assets other than margin stock of Company D for repayment of the credit.

12 C.F.R. § 221.2(h) (1987):

(h) "Margin stock" means: (1) Any equity security registered or having unlisted trading privileges on a national securities exchange;

(2) any OTC margin stock;

(3) any OTC security designated as qualified for trading in the National Market System under a designation plan approved by the Securities and Exchange Commission (NMS security);

(4) any debt security convertible into a margin stock or carrying a warrant or right to subscribe to or purchase a margin stock;

(5) any warrant or right to subscribe to or purchase a margin stock; or

(6) any security issued by an investment company registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a-8), other than:

(i) A company licensed under the Small Business Investment Company Act of 1958, as amended (15 U.S.C. 661); or

(ii) a company which has at least 95 percent of its assets continuously invested in exempted securities (as defined in 15 U.S.C. 78c(a)(12)); or

(iii) a company which issues face-amount certificates as defined in 15 U.S.C. 80a-2(a)(15), but only with respect of such securities.

Constitutional Provision

U.S. Const. art. VI, § 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Rules

Sup. Ct. R. 17:

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the United States Court of Appeals for the Federal Circuit, the United States Court of Military Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

Fed. Rule Civ. P. 23.1:

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that the plaintiff's share or membership thereafter devolved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal

or compromise shall be given to shareholders or members in such manner as the court directs.

Del. Sup. Ct. R. 8:

Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.

Appendix B

SUPREME COURT RULE 28.1 STATEMENT

Respondent Beatrice Companies, Inc. is wholly owned by non-party Beatrice Company, formerly known as BCI Holdings Corporation.

Two non-party limited partnerships, KKR Associates and BCI Partners, L.P., through five intermediate partnerships of which one or the other of them is the general partner, control substantially all of the voting securities of Beatrice Company. In only two of those five intermediate partnerships, BCI Securities, L.P. and BCI Equity Associates, L.P., were any limited partnership interests publicly registered.

Neither Beatrice Companies, Inc. nor Beatrice Company has any subsidiary the stock of which is publicly traded.

Respondent Kohlberg Kravis Roberts & Co. is a general partnership, the general partners of which are Henry R. Kravis, George R. Roberts, Robert I. MacDonnell, Paul E. Raether and Michael W. Michaelson. These individuals are also the general partners of KKR Associates and certain of these individuals are also the general partners of BCI Partners, L.P. Such individuals and/or entities could also be deemed to be affiliates of certain other companies unrelated to Beatrice Companies, Inc. or Beatrice Company, the equity securities of most of which are not publicly traded. Such of those companies the equity securities of which are publicly traded are L.B. Foster Company, Fred Meyer, Inc., Pace Industries, Inc., Motel 6, Inc. and SCI Holdings, Inc.

Respondents United Operating Company, The Martha & Regina Brand Foundation, Inc. and SCB Co. are privately held corporations.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. 87-304

WILLIAM LEIGHTON,

Petitioner, Objector-Appellant

v.

BEATRICE COMPANIES, Inc. et al.

Kohlberg, Kravis, Roberts & Co.

and Joel B. Smilow,

James L. Dutt,

Respondents, Defendants-Appellees.

PETITIONER'S REPLY BRIEF AND APPENDIX

On Petition for Certiorari to

the Supreme Court of Delaware

William Leighton

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PETITIONER'S REPLY BRIEF

Since the respondents have moved the Court to deny the petition for certiorari for want of jurisdiction, the allegations of the petition and of this reply brief should be deemed to be true for want of contrary findings by the courts below.

The obfuscation below.

The respondents have deliberately confused the courts below as early as April 11, 1986 by filing a misleading "opinion letter" with the Chancellor, three days before the "fairness" hearing. The letter is reproduced in full in the appendix to this reply, R.88a ff. The purpose of the letter was not only to confuse the Chancellor concerning this case but also to prevent him from ruling on contentions that would have been fatal to KKR's designs on Safeway, Owens Illinois and Jim Walter Corporation, all of which were taken over by KKR after the

Beatrice episode. Beatrice, Safeway, Owens-Illinois and Jim Walter were all listed stocks on the New York Stock Exchange.

KKR's assault upon Beatrice had to succeed in order to make the other assaults possible.

If the assault on Beatrice had not succeeded, the banks would not have lent KKR the funds with which to take over Safeway, Owens-Illinois and Jim Walter. Indeed, just this September 15, KKR announced that the banks had agreed to finance its takeover of Jim Walter Corp. by lending it $2,300,000,000 for that takeover.

The continuing obfuscation here

The respondents are arguing the merits of the case by using footnotes and hope that this Court will initially decide the issues. In reply thereto, the following points should be noted :

1. As early as April 4, 1986, this

petitioner has submitted objections to the Chancellor with respect to BCI's prospectus of March 11, 1986 which was then effective under the Securities Act of 1933. The prospectus covered BCI's Initial Public Offering of the preferred, R. 74a. The Chancellor then had jurisdiction of KKR and was about to consider a "settlement" without any consideration of the facts disclosed in that prospectus. BCI was not named as a party even though it was due to become KKR's vehicle for the takeover. In answer to these objections, the respondents have submitted their April 11, 1986 letter, R. 88a ff. This placed federal questions squarely before the Chancellor whose duty it was to decide them in accordance with Article VI, Section 2.

The Chancellor did not do so. Other courts have done so, Alaska Interstate Co. v. McMillan, 402 F. Supp. 532 (D..Del., 1975), Revlon v. Pantry Pride,

Inc., 621 F. Supp. 804 (D.Del., 1985). If the Chancellor had not wished to express an opinion as to the Federal questions presented, he should have ordered the respondents to remove the case to the United States District Court for the District of Delaware in accordance with 28 U.S.C. Sec. 1441.

Instead, the Chancellor concentrated his attention on, and examined at length, R.12a - 14a, the amended complaint which had not been answered by the defendants and which was the offshoot of collusion between the plaintiffs' and the defendants' counsel. Apparently, the Memorandum of Understanding dated February 1, 1986, had provided for the filing of this sham pleading, the only pleading ever considered by the Chancellor. The Chancellor had to act post haste because at the "fairness" hearing, he was told that the transaction with the banks had

to close within 48 hours. The Chancellor obliged by issuing his memorandum opinion within 48 hours, R. 1a.

The defendants had consented to be sued on certain grounds and none other. It seems that Delaware procedure permits a pleading that has not been answered to serve as the basis for class certification on consent for the purpose of defeating the Federal rights of the members of the class, of shareholders who are not members of the class and of the corporation. Article VI, Section 2 says that this cannot be done. The defendants say it can. This issue should be resolved by the courts below in the first place. See Section 44 of the 1940 Act. KKR is fully aware of the problems it faces with its financing methods. The BCI prospectus of March 11, 1986 states, R.74a :

"In order to effect the Merger, (BCI) expects to obtain approximately $6.4 billion in financing composed of approximately $3.5 billionof indebtedness under a bank credit agreement (excluding a $600 million working capital facility); approximately $2.5 billion from the sale of (BCI's) debt securities; approximately $407 million from the sale of common stock of Holdings; and approximately $10 million from the sale of warrants to purchase common stock of (BCI), all as more fully described below. See "Financing of the Merger".

Question:How could BCI, a $15,000 corporation, obtain bank and debenture credit of $6,400,000,000 for the purpose of "acquiring" Beatrice ? Answer: (a) through the fiction of purpose "loans" in violation of Regulations U and G, by pledging all of the Beatrice stock unlawfully seized from the shareholders (including this shareholder) as collateral for the financing, (b) by

purporting to "delist" Beatrice stock from the N.Y.S.E. and (c) by making a public offering of BCI common stock and warrants without the benefit of registration pursuant to the Securities Act of 1933.

Moreover, in its current tender offer for the Jim Walter Corporation dated August 18, 1987, KKR shows that it is aware of the problems under Regulations G, U and X posed by its financing methods. Please see the statement excerpted from that tender offer, R. 93a. The respondents are blowing hot in this Court. But they are blowing cold in their Jim Walter tender offer materials which are currently aimed at the public at large.

2. This petitioner is not a plaintiff against KKR and Beatrice for which reason the objection procedure was used. Section 327 DCL and F.R.Civ.P. 23.1

both apply to plaintiffs and not to objectors. There is nothing evil about an objector stating his views about a settlement and taking it up on appeal with the appellate courts. If this objector's contentions had been "frivolous" the Delaware Supreme Court would have said so.

A "fairness" hearing is an adversary proceeding where the proponents of a settlement have the burden of showing that the proposed arrangement is "fair, reasonable and adequate". Such a showing cannot be made where, as here, the plaintiffs have an inherent conflict of interest. The plaintiffs here have purported to sue both representatively on behalf of a class (as defined by them, excluding all other shareholders) and derivatively on behalf of Beatrice, the corporation. Under Delaware law, there is a basic question as to whether or not a plaintiff may sue in both capacities,

Harff v. Kerkorian, Del. ch., 324 A. 2d 315. Here, the Chancellor has not resolved the issue, although he identified it, R. 1a - 2a.

Since the plaintiffs and the defendants have lined up on the same side, it is the function of the objector to test the proposed arrangement for compliance with basic principles of equity and with the mandates of Federal law to the contrary. The settlement here purports to extinguish claims arising after April 16, 1986 under State and Federal law. This violates the principle announced by this Court in Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11, 19 (1979):

> We conclude that when Congress declared (in Section 215 of the Investment Advisors Act) that certain contracts are void, it intended that the customary legal incidents of voidness would follow, including the availability of a suit for rescission or for an injunction against the continued

operation of the contract, and for restitution.

The federal securities laws involved here, i.e. the 1940, 1934 and 1933 Acts contain similar provisions. The enforcement of these Federal laws, should not be made "subject" to the ad hoc interpretations of State courts.

3. This Court has granted certiorari in Levinson v. Basic, Inc., 786 F. 2d 741 (C.A. 6, 1986), --- U.S. --- (1986), a case that presents issues strikingly similar to those in the case at bar. Indeed, if the two cases were to be heard together a better understanding of both would be possible and the issues narrowed to those that have to be decided.

If the Basic shareholders are entitled to be heard by this Court, so should the Beatrice shareholders whose claims are about the same. Both classes of shareholders suffer from the same

evil, the unbridled power of the Merger and Acquisition law firms to deprive America's shareholders of their property by permitting their clients, such as KKR, to engage in open violations of law. This pernicious practice, based on scienter, has its genesis in Wolfson v. United States, 405 F. 2d 779 (C.A. 2, 1968), cert.denied, 394 U.S. 946 (1968) and has since been often imitated.

The evils revealed by this record do not stop there. The defendants' law firms work hand-in-glove with the plaintiffs' law firms as their joint Brief in Opposition amply demonstrates. Obviously, the respondents-plaintiffs are no longer independent of the respondents-defendants. Nor were they at any time during the pendency of this litigation.

As the Chancellor has determined, R. 9a, the first of these suits was filed on November 15, 1985. The suit

challenged actions taken by the Beatrice board on November 13 and 14, 1985, R. 8a.

How did a private plaintiff gain access to confidential matters discussed by the board in utmost secrecy ? How did that plaintiff have access to the minutes of that meeting (which had been held in Chicago), arrange for counsel representation, prepare and file a complaint in Wilmington, Delaware within 24 hours of the board meeting ? The minutes of that meeting cover 26 single-spaced typewritten pages, all marked "confidential" and all protected, apparently, by the "confidential" label attached to each.

If this had been a truly adversary proceeding, then the respondents-defendants would have taken the depositions of all the plaintiffs in order to determine how they had breached Beatrice's security. But the record

shows that no such depositions had been taken. Rather, the possibility exists that the board's minutes had been purposely "leaked" to plaintiffs' attorneys so that they could file the first suit on November 15, 1985 and claim standing as "plaintiffs' lead counsel".

All of this has nothing to do with shareholders' Federal rights enacted by Congress over a period of half a century. Rather, on the civil side of the Delaware system of justice, it looks as if Federal securities laws are deemed to be posters on the walls. Drastic steps are necessary if the intent of Congress and the mandates of the Constitution are to be carried out. Only this Court can take such steps.

Conclusion

The Writ of Certiorari should be granted.

Respectfully submitted:

William Leighton

Petitioner

September, 1987

(Letterhead)

POTTER ANDERSON & CORROON

* * * * * * * * * * *

April 11, 1986

HAND DELIVERED

The Honorable William T. Allen
Chancellor, Court of Chancery
Public Building, Wilmington, DE 19801

In re Beatrice Companies, Inc.
Litigation, Consolidated C.A. No. 8248

Dear Chancellor Allen :

On behalf of the Beatrice and KKR defendants, we respectfully submit this letter in response to the issues raised in the letter dated April 4, 1986 from William Leighton, purporting to object to the proposed settlement of the above-consolidated actions. We understand that plaintiffs also intend to address Mr. Leighton's objections. For a number of reasons, the purported objections are both procedurally and substantively deficient, and should be rejected.

First, it does not appear that Mr. Leighton is even a stockholder of Beatrice. His letter suggests that he is not, and a search of the Beatrice stockholder list shows that he was not a record stockholder as of February 20, 1986. If in fact Mr. Leighton is not a stockholder, then he is not a member of the class and lacks standing to complain about the proposed settlement.

Second, the purported objections assume "that BCI (Holdings Corporation) has been properly served with process and is subject to the jurisdiction of the Court." This assumption is erroneous. BCI is not a party to this consolidated action, has never been served with process, and is not before the Court.

More fundamentally, Mr. Leighton's substantive attacks on the legality of this transaction are frivolous. Mr. Leighton states that BCI has violated, or

intends to violate, Sections 7(a), 18 and 49 of the Investment Company Act, assuming, without discussion, that BCI is an investment company for the purpose of the statute. However, BCI is not now, nor will it be after the Merger, an investment company since it meets none of the definitions contained in Section 3 of the Act. At present, BCI has no business activities. After the merger, BCI's business will be the ownership of directly and indirectly wholly-owned subsidiaries which will not be investment companies and which will own and operate the current business of Beatrice Companies, Inc. Beatrice produces and markets food and food-related products, in addition to a broad range of non-food products for use in various consumer, commercial and industrial markets. Since BCI is not an investment company within the meaning of Section 3 of the Act, the

remaining sections referred to in Mr. Leighton's letter have no applicability to the subject transaction.

There is also no basis for Mr. Leighton's claim that BCI is in violation of the margin rules issued by the Federal Reserve Board pursuant to Section 7 of the Securities Exchange Act of 1934, because "it proposes to borrow more than $4,000,000,000 in excess of the amount permitted by Regulation G, or, for that matter, by Regulation U." As the funds to effectuate the transaction are being borrowed only at the time of the merger, such borrowings will not be directly or indirectly secured by any margin stock and therefore will not violate Regulations G or U. On January 10, 1986, the Board issued an interpretation of Regulation G that addressed its applicability to a purchaser of debt

securities to finance corporate takeovers. (12 CFR 207, Section 207.112). This interpretation relates to the application of the margin requirements to two situations involving acquisitions utilizing tender offers. No tender offer is involved in the acquisition of Beatrice by BCI.

For all the reasons stated above, Mr. Leighton's objections are without merit and should be rejected.

(Emphasis supplied).

Respectfully submitted,

POTTER ANDERSON & CORROON

By /s/ Robert K. Payson

Attorneys for Kohlberg Kravis Roberts & Co. and Joel E. Smilow

RICHARDS LAYTON & FINGER

By /s/R.Franklin Balotti/RKP

Attorneys for the Beatrice Defendants

N.B. This document is mentioned at footnote 3 on page 4 of respondents' Joint Brief in Opposition but is not included in the appendix thereto.

Offer to Purchase for Cash

All Outstanding Shares of Common Stock

of

JIM WALTER CORPORATION

at

$60 Per Share Net

by

Hillsborough Acquisition Corporation

a Corporation Formed by

KOHLBERG KRAVIS ROBERTS & Co.

* * * * * * * * *

August 18, 1987 * * *

Federal Reserve Board Regulations.

Federal Reserve Board Regulations G, U and X (the "Margin Credit Regulations") restrict the extension or maintenance of credit for the purpose of buying or carrying margin stock, including (Jim Walter) Shares, if the credit is secured directly or indirectly by margin stock. Such secured credit may not be extended

or maintained in an amount that exceeds the maximum loan value of the collateral.

The definition of "indirectly secured", contained in the Margin Credit Regulations provides that the term does not include any arrangement with a customer if the lender, in good faith, has not relied upon margin stock as collateral in extending or maintaining the particular credit. On January 10, 1986, the Federal Reserve Board announced an interpretative rule relating to the applicability of Regulation G to the issuance of debt securities by a shell corporation to finance the acquisition of margin stock of a target company. The Board stated that it is of the view that such debt securities are generally presumed to be indirectly secured by the maragin stock of the target company for the purposes of Regulation G because the purchasers of the debt securities could not in good faith lend without reliance

on the margin stock as collateral. The Board stated that this presumption would not apply if, among other things, there is a merger agreement between the acquiring and target companies entered into at the time the commitment is made to purchase debt securities or in any event before loan funds are advanced. *** This issue has not, however, been the subject of a judicial determination since the announcement of the interpretative rule.

Prospectus, 23,000,000 Shares, E-II Holdings, Inc. Common Stock ($.01 par value)* * * * * * *

The date of this Prospectus is July 2, 1987. * * ***The Company**

E-II Holdings Inc. (the "Company") is a newly formed holding company that will manage a portfolio of businesses and will seek to enhance its value through leveraged acquisitions, improved management of operations, selective dispositions and corporate restructurings. The Company's experienced management team is headed by Donald P. Kelly, former Chief Executive Officer of Esmark, Inc. and BCI Holdings Corporation ("BCI"). Mr. Kelly will continue to serve as Chairman of the Board of, and hold an equity interests in, BCI.

In April 1986, BCI acquired Beatrice Companies, Inc. ("Beatrice") in a $6.2 billion leveraged acquisition (the

"Merger") led by Mr. Kelly and representatives of Kohlberg, Kravis Roberts & Co., a private, merchant banking firm.* * *

Investment Company Act. The Company does not propose to engage in investment activities in a manner or to the extent which would require it to register as an investment company under the Investment Company Act of 1940 (the "Investment Company Act"). The Investment Company Act places restrictions on the capital structure and business activities of companies registered thereunder and application of its provisions would have a material adverse effect on the Company. Generally an issuer is deemed to be an investment company subject to registration if its holdings of "investment securities" (securities other than (i) securities issued by majority owned non-investment company subsidiaries and (ii) government

securities) exceed 40% of the value of its total assets exclusive of governmental securities and cash items. The Investment Company Act permits a company to avoid becoming subject to such Act for a period of up to one year despite the holding of investment securities in excess of such amount if, among other things, its board of directors has adopted a resolution which states that it is not the company's intention to become an investment company. The Company's board of Directors has adopted such a resolution. If necessary, the Company may invest portions of excess funds in government securities rather than other higher yielding securitiese in order to avoid investment company status. * * * (emphasis supplied).

STATUTES INVOLVED

Investment Company Act of 1940, 15 U.S.C. Sec. 80a-1 et seq.

Jurisdiction of Offenses and Suits. Sec. 44 : The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this title or the rules, regulations or orders thereunder, and, concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations or orders thereunder. * * *

Judicial Code, 28 U.S.C.

Section 1441. Actions removable generally

* * * (b) Any civil action of which the

district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties.

* * *

Supreme Court, U.S.
F I L E D
OCT 28 1987
JOSEPH F. SPANIOL, JR.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. 87-304

WILLIAM LEIGHTON,

Petitioner,

v.

BEATRICE COMPANIES, Inc. et al.

Kohlberg, Kravis, Roberts & Co.

and Joel B. Smilow,

James L. Dutt,

Respondents.

PETITIONER'S FIRST SUPPLEMENTAL BRIEF AND APPENDIX

William Leighton

249 West 11th Street

New York, N.Y. 10014

(212)255-0001

October,1987

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Purpose

In accordance with Rule 22.6., petitioner respectfully submits this Supplemental Brief to call the Court's attention to a new case and other intervening matter not available at the time of the filing of petitioner's Reply Brief.

This new matter will refute some of respondent's "footnote" arguments and assertions of fact which should have been presented to the courts below in the first place.

1. The respondents' Rule 28.1 Statement is defective and misleading

Six days after the filing in this Court of respondents' Brief in Opposition, a prospectus of Union Texas Peetroleum Holdings, Inc., ("Union Texas") became effective, on September 24, 1987. In it, KKR discloses that, as of June 30, 1987, it controlled through certain partnerships, 49.7% of Union

Texas and that after September 24, 1987, it would control, through such partnerships, 39.2% of the voting power of Union Texas. KKR also discloses that it had acquired this interest in July, 1985. The prospectus states that Union Texas has been approved for listing on the N.Y.S.E. Relevant portions of this prospectus are in the Appendix hereto, R. 101a.

In their Rule 28.1 Statement the respondents have not listed Union Texas among the corporations controlled by KKR, and for good reason from their point of view. The structure of KKR's Union Texas investment is that of an investment company, KKR, controlling the partnerships that beneficially own KKR's portion of Union Texas. This brings the transaction squarely within the coverage of Section 3(a) of the 1940 Act.

The same structure exists

with respect to KKR's control of Beatrice through BCI. The record below shows that, in 1985, KKR has created the "Kohlberg Kravis Roberts & Co. 1986 Investment Fund Partnerships". Under KKR's control, these partnerships have invested in Beatrice common stock enabling KKR to produce a majority vote in favor of the merger. The partnerships' investments were taken over by BCI at merger time, April 17, 1986, with money borrowed from the banks and the debenture holders. The point was noted by the Delaware Supreme Court which, in its August, 1986 Order, R. 46a - 47a, requested special briefing.

Yet, at footnote 10 on page 12 of their Brief in Opposition, the respondents claim :

> KKR is not an investment company because it is neither an issuer nor an entity engaged in the activities enumerated in Section 3(a) (of the

1940 Act)."

KKR's presentation of the facts should have been made in the first instance to the S.E.C. which alone could have granted BCI a temporary or permanent exemption from the 1940 Act in accordance with the procedures prescribed by Section 3(b)(2) thereof.

KKR has never applied for such an exemption whether for itself or for BCI for the obvious reason that it could not have done so "in good faith". Now, KKR is seeking a determination by this Court of facts that would sustain an exemption from the Act. Since compliance with the statute would not have enabled KKR to realize hundreds of millions of dollars in profits, KKR has simply ignored it. According to the September 6, 1987 issue of the New York Times, "billions of dollars were shaken from Beatrice". The Wall Street Journal of

September 4 agreed, stating that the "Beatrice buy-out may net investors a fivefold return."

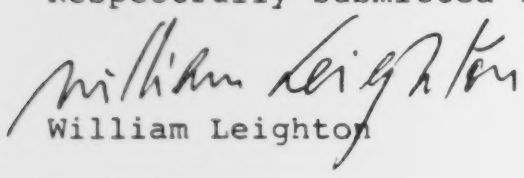
2. BCI is currently involved in litigation concerning the amendment of the indentures with respect to some or all of its Regulation G indebtedness which it incurred in April, 1986 in connection with its acquisition of Beatrice. There is included in the Appendix hereto, R. 105a, a decision by a New York State court, filed June 25, 1987, denying a motion for a preliminary injunction. Notably absent from that court's reasoning is any reference to the Trust Indenture Act of 1939 which would govern the disposition of any such suit.

Clearly, BCI is continuing its activities in violation of Section 7(a)(2) of the 1940 and is frustrating the powers of State equity courts to carry out their functions under Section 44 of the Act. This is the direct result

of the Delaware courts' refusal to enforce Section 7(a) in the context of the case before this Court.

Had the New York State court known that BCI is engaged in the continuing violation of Section 7(a) and exists in defiance thereof, it might have granted the injunction on the ground that BCI was before it with "unclean hands".

Respectfully submitted :



William Leighton

Petitioner

PROSPECTUS

18,000,000 Shares

UNION TEXAS PETROLEUM HOLDINGS, INC.

Common Stock

(par value $.05 per share)

* * * * * * * * *

The Common Stock has been approved for listing on the New York and Pacific Stock Exchanges

* * * * * * * * * * * * * * * * * * *

The date of this Prospectus is September 24, 1987

* * * * * * * * *

The Company

General. The Company is the largest independent (non-integrated) oil and gas company in the United States, with world wide operations and proved oil and gas reserves of 511 million boe (sic) as of December 31, 1986. * * * *

Principal Shareholders. From 1962 until July 1985, the Company and its

predecessors were operated as wholly-operated subsidiaries or unincorporated divisions of Allied, a wholly-owned subsidiary of Allied-Signal, Inc. ("Allied-Signal"). In July, 1985, the KKR Partnerships, which are controlled by an affiliate of Kohlberg Kravis Roberts & Co. ("KKR"). purchased approximately 50% of the Common Stock of the Company ("the 1985 Stock Acquisition"). * * * * * (emphasis supplied).

* * * * * * * * * *

MANAGEMENT

Directors and Executive Officers* * *

Jerome Kohlberg, Jr. has been a director since July, 1985. Mr. Kohlberg was a partner in KKR from its organization in 1976 until 1987, when he became a partner in Kohlberg & Co., a merchant banking firm. Mr. Kohlberg is a limited partner in KKR. He is also a director of L.B. Foster Company, Motel 6 G.P., Inc., PACE Group Holdings, Inc. PACE INDUSTRIES,

Inc., Storer Communications, Inc., Fred Meyer, Inc., Houdaille Holding Corp., SCI Holdings, Inc. and BCI Holdings Corporation.

Henry R. Kravis has been a director since July, 1985. Mr. Kravis has been a partner in KKR since its organization in 1976. He is also a director of BCI Holdings Corporation, Houdaille Holdings Corp., Motel 6 G.P., Inc., Owens-Illinois, Inc., PACE Group Holdings, Inc., PACE Industries, Inc., SCI Holdings, Inc., Storer Communications, Inc., L.B. Foster Company, Safeway Stores Holding Corporation and AFP G.P., Inc.

George R. Roberts has been a director since July, 1985. Mr. Roberts has been a partner in KKR since its organization in 1976. He is also a director of BCI Holdings Corporation, Beatrice Companies,

Inc., Houdaille Holding Corp., Motel 6 G.P., Inc., Owens-Illinois, Inc., PACE Group Holdings, Inc., PACE Industries, Inc., Red Lion Properties, Inc., SCI Holdings, Inc., Storer Communications, Inc., Safeway Stores Holding Corporation and AFP GP, Inc. Mr. Roberts is a first cousin of Mr. Kravis.* * *

SUPREME COURT : NEW YORK COUNTY

INDIVIDUAL ASSIGNMENT SYSTEM, Part 8

- -

GEORGE PISIK, on behalf of himself and all other holders of the Debt Securities of BCI Holdings Corporation similarly situated,

Plaintiff,

vs.

BCI HOLDINGS CORPORATION,

Defendant.

- -

Index No. 14593/87 - Filed June 25, 1987

WILLIAM P. McCOOE, J.:

Plaintiff moves pursuant to CPLR 6301 for a preliminary injunction.

In April, 1986 defendant BCI was incorporated in Delaware in connection with a leveraged buyout and issued $2.5 billion in debt securities in four series

of notes or debentures. Each series is governed by an Indenture dated April 15, 1986 selecting New York both as a forum and for the governing law (Sec. 12.08) and providing for the adoption of amendments (such as those now proposed by BCI) by the written consent (vote) of the holders of a majority in principal amount of the securities then outstanding (Sec. 9.02). After approval all security holders are bound (Sec. 9.04). To further its present restructuring program BCI is proposing amendments to its debt holders by dissemination of a consent solicitation statement dated May 21, 1987, and an amendment dated June 15, 1987 which offer to pay cash consideration (either $12.50 or $10.00 per $1,000 of debt) to holders who consent to the amendments while paying nothing to debt holders who refuse or fail to consent but will nevertheless be bound upon their adoption. While the

period for solicitation of consent expires on June 24, 1987, if the number of consents is then insufficient BCI will continue to accept consents thereafter.

Plaintiff attempts to address the prerequisites to the grant of a preliminary injunction set forth in Albini v. Solork Assoc., 37 AD2d 835, namely, a likelihood of success on the merits, irreparable harm and a favorable balance of equities.

Plaintiff bases its likelihood of success on the merits upon an alleged public policy in New York against "vote buying" including N.Y.S. Const., Art. 2 Sec. 3, Election Law, Sec. 17.142 and BCL (Business Corporation Law) Sec. 609(e) while conceding that none of these authorities expressly governs a solicitation of the holders of debt securities. Plaintiff adds that the consent solicitation program also violates both the

Indentures, which do not contemplate such activity, and the contractual implied convenant of good faith and fair dealing. Plaintiff argues that irreparable injury will lie in the event the Court later determines the amendments were illegal. Plaintiff urges the implementation of the amendments could have a drastic effect on holders while the equities of defendant BCI are slight as is the effect of the grant of relief to plaintiff.

Plaintiff's motion for a preliminary injunction must be denied since plaintiff has not met the Albini requirements nor has he shown a clear right to relief. Gulf & Western Corp. v. The New York Times, Co., 81 AD2d 772, 773.

Plaintiff has no likelihood of success on the merits since defendant BCI's consent solicitation of its holder-creditors does not violate any

public policy against "vote buying", Kass v. Eastern Airlines, Inc., Del. Ch., Civ. Action Nos. 8700, 8701, 8711 (slip op., Nov. 14, 1986); Katz v. Oak Inds., Inc. 508 A. 2d 873, (Del. Ch. 1986). The two Delaware cases, like the present one, involved a debtor-creditor rather than a shareholder relationship with the latter's attendant fiduciary duties. Plaintiff concedes that the constitutional and statutory authorities he cites do not expressly extend to the present solicitation. Considerations of public policy which apply in the political or shareholder areas are less apparent in the largely unregulated field of bondholder voting rights. Nor does defendant's consent solicitation violate any implied term of the Indentures. While New York law recognizes an implied convenant of good faith and fair dealing in every contract, Kirke La Shelle Co. v. Paul Armstrong Co., 263 N.Y. 79, the

Delaware court in both Eastern Air Lines and Oak Industries, applying New York law, rejected those plaintiffs' attempts to reform the Indentures thereby. See also Sabetay v. Sterling Drug, Inc., 69 N.Y.2d 329. Plaintiff cannot demonstrate irreparable injury since only monetary damages are involved, Fair Sky, Inc. v. Int't Cable Ride Corp., 23AD2d 633, and he is damaged only if he could eventually prove diminution in the value of his securities. Morgan Stanley & Co., v. Archer Daniels Midland Co., 570 F. supp. 1529, 1534.

Plaintiff does not show a favorable balancing of the equities since the denial of relief will permit each bond holder to make a market-type choice as to the adequacy of consideration being offered while a preliminary injunction would allow debt holders to conclude plaintiff's claim was favorably

adjudicated. Sherman v. Posner, 266 F. Supp., 871, 874.

The Court is not required to pass upon the remaining issues raised by defendant such as plaintiff's standing as a bond holder or alleged delay in the present application. Nevertheless the Court notes the existence of a separate ground for dismissal of the action in plaintiff's failure to satisfy a contractual condition precedent to its commencement. Section 6.06 of the Indentures requires that the holders of a majority of the securities must request the Trustee to commence the action, offer to indemnify the Trustee and afford the Trustee 60 days to comply. This standard Indenture requirement has been upheld consistently as a reasonable restriction on the freedom of action of individual bondholders. Sutter v. Hudson Coal Co., Tietjen v. United Post Offices Corp., 167

A. 846 (Del.Ch. 1933); Dillon v. Elmore, 198 N.E. 128 (Ill. Supr., 1935).

Plaintiff's motion for a preliminary injunction is denied.

This is the Decision and Order of the Court.

Dated June 21, 1987 /s/ William P. McCooe

J.S.C.